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ARTICLE

THE JEFFERSONIAN REPUBLICANS VS. THE FEDERALIST COURTS

BY KEVIN R. C. GUTZMAN*

The conflict between Jeffersonian Republicans and the Federalist-dominated federal courts was the longest-running, most consequential aspect of the party conflict pitting former revolutionary brothers-in-arms against one another. It centered on Virginia, which, not coincidentally, contributed the most significant players to both sides and where some of the key court cases arose. The repercussions of this long-running confrontation have been felt in legislative halls, in courts, on the hustings, and even on battlefields ever since.

I.

A.

Our story begins in pre-Revolutionary Virginia. In 1774, at the climax of the Imperial Crisis of the 1760s–1770s, a member of the House of Burgesses named Thomas Jefferson sat down in his Albemarle County home, Monticello, to draft legislative instructions for the Virginia delegates to the upcoming Continental Congress. Jefferson hoped that Virginia's congressmen, who would be elected by the House of Burgesses, would insist on a highly pugnacious American communication with the king.

Jefferson detailed what by that time had come to be the standard Virginia Patriot argument.¹ The colonies (Virginia) had been created by the initial settlers through their own effort and with their own money. Their departure from England had been undertaken in exercise of their natural

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1. K[evin] R. Constantine Gutzman, *Jefferson's Draft Declaration of Independence, Richard Bland, and the Revolutionary Legacy: Giving Credit Where Credit is Due*, 1 J. HIST. SOC'Y 137, 137–154 (2001); THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), http://www.iwp.edu/docLib/20131119_Jefferson_Rights_of_British_America_1774.pdf.

right to emigrate (this radical idea was an invention of Jefferson's older kinsman, Burgess Richard Bland), and their emigration had severed their inherited tie to Parliament, which thus retained no authority over them. The colonial link between England/Britain and the colonies (Virginia) had been established by the colonists' free will. If the king ceased to fulfill the functions for which his office had been given to him, the colonists retained the right to strip him of that office and replace him with someone else, even to remake their government altogether.

"Let those flatter who fear," Jefferson (never very assertive in person) thundered. "It is not an American art." George should understand that he was the colonists' servant, not their proprietor. Each of the colonies retained the rights of self-government it had had in its primeval state, before it had (in Jefferson's account) voluntarily entered into a relationship with the Crown. While the king had rightful authority concerning some policy issues, notably in relation to matters of foreign policy, the colonists would resist in case he pushed the last several years' interference in the colonies' internal matters much further. The British Empire could be a happy, if a well-poised, empire.

In contemporary constitutional terms, what Jefferson did here was to lay out a federal view of the British Empire. He based this conception on a somewhat fantastical idea of the voluntary, separate consent of each of the thirteen colonies.

Although physical indisposition meant that Delegate Jefferson could not personally propose these instructions to his fellow members of the Old Dominion's political elite in 1774, some of the colonial political leadership took the opportunity to slap the rather un-Jeffersonian title "A Summary View of the Rights of British America" on it and publish a few copies. Soon enough, this publication made Jefferson the talk of the North American political world.

B.

Jefferson thus found himself a member of the Second Continental Congress in 1776. If he had had his way, he would have been relieved of that office, however. Everyone knew that the Virginia Convention to convene in May would be drafting a republican constitution, so Williamsburg was where the action was. As Jefferson plaintively pleaded, helping to draft that constitution should be his destiny. It required the assistance of Virginia's leading men. Nothing was more important, he believed: "In truth it is the whole object of the present controversy; for should a bad government be instituted for us in future it had been as well to have accepted at first the

bad one offered to us from beyond the water without the risk and expence [sic] of contest.”²

In the Continental Congress, each state had one vote. That vote could be cast by a quorum of the state’s delegation. Unfortunately, Virginia had only a bare quorum in attendance, which meant that if Jefferson departed for Williamsburg, Virginia would be left without a vote. Although they received Jefferson’s several letters begging to be replaced in Congress, Convention leaders such as George Mason, Edmund Pendleton, and Patrick Henry did not comply. He would have to content himself with a congressman’s work.

Work that made him immortal.³ Congress responded to Virginia congressman Richard Henry Lee’s motion that “these colonies are, and of right ought to be, free and independent states” by appointing a five-man committee to draft a declaration to that effect. It named the author of “A Summary View” to the committee, which also included eminent members John Adams of Massachusetts and Benjamin Franklin, the only world-famous American.

From several decades’ removed, former chairman Adams recalled four reasons why he had assigned the task of writing a rough draft to the much younger, far more reserved Jefferson: that Jefferson was a Virginian, which was an important political factor in light of Virginia’s outsized population and its enormous geographic extent, while Adams was from Massachusetts; that Jefferson was southern, while he northern; that Adams was “obnoxious” (by which he meant that other members were sick of hearing him constantly pound the drum for independence); and that Jefferson—author of, among other things, “A Summary View”—was a better writer.⁴

By this point, Jefferson had already written and dispatched a draft constitution for Virginia. Friends in Williamsburg told him that it had arrived too late in the process to be used in the drafting. However, the Jeffersonian preamble laying out the case for independence was used, as were a few small suggestions such as that the upper legislative house should be named after the Roman Senate.

Back in Philadelphia, Jefferson presented his draft to Adams and Franklin, who each made a few stylistic/detail changes. The committee’s work done, the draft Declaration was reported to the full Congress, where major excisions were made over Adams’ vehement objections. Not affected by these changes, however, were the central points of the Declaration. The final document’s argument reflected the draftsman’s case of 1774 quite

2. Letter from Thomas Jefferson to Thomas Nelson (May 16, 1776), in *THE PAPERS OF THOMAS JEFFERSON* 292–293 (Julian P. Boyd, et al. eds., 1950).

3. KEVIN R. C. GUTZMAN, *THOMAS JEFFERSON—REVOLUTIONARY: A RADICAL’S STRUGGLE TO REMAKE AMERICA* 9–97 (2017).

4. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 99 (5th prtg. 1997).

clearly: rightful government rests on the consent of the governed, the people can replace the government when the government does not fulfill the purposes for which it was created, King George III has not fulfilled his function to the Americans' satisfaction, and so "these colonies are, and of right ought to be, free and independent states."

Note the plural. The congressmen, each selected by his homeland's legislature, announced to the world that what had been colonies were now states—that is, sovereign entities. They were not one nation, but thirteen integral units. The word "state" had had that signification since it was introduced into modern political science by Machiavelli.

C.

Congress did this work on the fly. One reason Adams omitted from his explanation of his assignment of draftsman's duties to Jefferson was that he, Adams, had more important work to do. Armies had to be raised, diplomacy had to be conducted, money had to be found or raised, provisions had to be obtained. John Adams bore a highly disproportionate share of the congressional load. Among the other tasks to which Congress turned its attention was that of drafting a federal constitution.

Adams at one point referred to Congress as a meeting place of ambassadors, and so it was. It functioned essentially as an interstate clearinghouse of government policy, hashing out differences and forwarding the results to the states so that they could act on them (or, often, not). Any authority Congress had remained informal. It rested essentially on state governments' voluntary cooperation. In response to this problem, Congress in 1777 sent the states for their unanimous ratification the Articles of Confederation.

The Articles did not envision any radical reallocation of authority. Rather, if adopted, they would mean that Congress's acts now rested on firm legal and political footing. The underlying theory was that the states were sovereign, which meant that they each possessed full power to take any step which a government might take, and thus the Articles could not go into effect in any of them until it had agreed that they should.

Besides retaining the Declaration's terminology of "United States of America," the Articles also made this sovereignty point explicit. Article II, the first substantive article, said that each state "retained" (would continue to have) "its sovereignty." Thereafter, the powers the Confederation government might exercise were listed and the mechanisms it could use were described and established.

Within a relatively short time, twelve states ratified the Articles. Only Maryland held out. It could not agree to enter into federal relations with so extensive a state as Virginia, Maryland said, because a state extending from the Atlantic to Minnesota must have so large a share of the federation's population as forever to dwarf Maryland. Thus, Marylanders' government

would be forever dominated by people from the neighboring state. Only Virginia's Northwest Cession of 1781, by which it surrendered all of its trans-Ohio River claims to the Confederation government, finally elicited ratification from Maryland, and thus put the Articles into effect.

II.

A.

By then, however, self-styled "Federalists"—men who wanted more power in the central government than the Articles provided—had embarked on a new quest.⁵ They wanted substantial amendment to the Articles, amendment granting the Congress power to collect taxes independently of state governments. These Federalists, not to be confused with the 1790s political party of the same name or with proponents of the federal principle then and since, believed that state governments would always be stingy in their support for the Confederation, and so they moved to augment Congress's powers.⁶ If the states would not cooperate, the Confederation should be able to act without state cooperation.

Ultimately, Federalist efforts to strengthen Congress by amending the Articles of Confederation failed because Rhode Island, easily the smallest state, refused to cooperate, and amendment required ratification by all thirteen states. Failing that, what to do?

B.

James Madison moved in the Virginia General Assembly for a conference of delegates from Virginia and Maryland to meet at Mt. Vernon, George Washington's Potomac River estate, in summer 1785 to iron out the two Potomac states' difficulties in sharing their river. Achieving some success, they decided jointly to call on all thirteen states to send delegates to Annapolis the next summer. The entire confederacy needed to work out its commercial policies, both interstate and international.

When the appointed date in fall 1786 arrived, however, only five states' delegations appeared in Annapolis. Although another was en route, this clearly would not suffice for a thoroughgoing reapportionment of the Confederation's commercial powers, with cession by the states of new powers to the Congress. Therefore, three of the energetic leaders of the Federalist movement in attendance at Annapolis, Madison, his Virginian colleague,

5. This Section relies upon one of my prior works. *See generally* KEVIN R. C. GUTZMAN, *JAMES MADISON AND THE MAKING OF AMERICA* (2012).

6. *See generally* KEITH L. DOUGHERTY, *COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION* (2001) (whether states actually were grudging in their support for the Confederation Congress is an interesting question. Scholars generally have echoed Federalist propaganda in this regard, but recent scholarship argues that Federalists drastically overstated their case. States did not contribute more, the argument goes, because they were unable to do so).

Edmund Randolph, and New York's Alexander Hamilton, took it upon themselves to craft a call from this abortive gathering to all thirteen state legislatures. There should be another convention in summer 1787, this time at more centrally located Philadelphia, with a more wide-ranging assignment. Not only commercial policy, but all of the Articles of Confederation's shortcomings should be addressed then. Other attendees signed, and the communique was sent off to Congress—then meeting in New York City.

Congress soon forwarded this call for a convention with the purposes of drafting proposed amendments to the Articles of Confederation to meet in the City of Brotherly Love the following May. In the end, twelve states joined in the effort. The lone holdout would be Rhode Island, the shoal on which the campaign for a tariff amendment had run aground.

Madison hurried back to Virginia to ensure not only that Virginia would send delegates to the Philadelphia Convention, but that George Washington would head the delegation selected by the General Assembly. Having seen to Washington's selection, Madison launched a successful effort to persuade the general his attendance would be essential. His and others' letters highlighting Shays' Rebellion and other signs of impending dissolution of the Confederation convinced the Indispensable Man that this was indeed the crisis of American liberty.

C.

When the Philadelphia Convention opened on May 25, 1787, then, Washington was present to accept election as president. The second motion from the floor was to close the doors, send the reporters home, and swear every participant to secrecy. With that accomplished, the real work began.

Virginia's young governor, Edmund Randolph, stood and announced that he had fifteen resolutions for the delegates' consideration. America, he said, needed a "national" government with a "national" legislature, a "national" executive, and a "national" judiciary. He went on to describe a bicameral legislature in which each house was apportioned by population and state legislatures no longer exercised their accustomed power of choosing members of Congress. Instead, the lower house would be popularly elected and the upper would be elected by the lower. Not only that, but this "Virginia Plan" (so called by historians because not Randolph, but Madison was its chief author) included provisions that the national legislature would be able to legislate about essentially any important question and would have a veto over all state laws, besides provisions that the "national" judiciary should have a supreme court and inferior courts, and the national courts should be able to hear virtually any significant case. To cap it off, the national constitution and treaties and laws made pursuant to it would be paramount to state constitutions and laws.

In our time, “national” and “federal” often are used interchangeably, but in the eighteenth century, they were alternative models of government: the former denoted a unitary system, perhaps with subordinate administrative units, while the latter referred to a decentralized system in which a central authority exercised certain delegated powers. On hearing the first “national” from Randolph, other delegates’ ears pricked up. By the time he finished his lengthy speech, several had objections.

They came to this: Congress and the state legislatures had charged the Philadelphia Convention with proposing amendments to the Articles of Confederation. To craft a national government instead would be beyond the powers conferred upon the delegates by their state legislatures, as the commissions borne by several states’ delegates made clear. Some went so far as to say that if this was going to be the Philadelphia Convention’s work, they could not have any part of it. They would bolt this august assemblage and return home to organize opposition to ratification.

While the Philadelphia Convention spent considerable time on issues such as apportionment of the legislature, the means of choosing legislators, the taxing power, protections for slavery, and the lengths of various officials’ terms, the national/federal question arose again and again. A few weeks into the convention, on July 5, two of New York’s three delegates stormed out of the assemblage, never to return, after explaining that writing a national constitution was not what their state legislature had sent them to do.

James Madison is commonly called “the Father of the Constitution.”⁷ Yet, he was terribly dissatisfied with the Philadelphia Convention’s handiwork precisely because it was not so national as he had hoped. His dogged insistence that both houses of the national legislature be apportioned by population finally won him a warning from the more pragmatic John Dickinson of tiny Delaware that if Madison won his way in structuring both houses, small states such as Delaware would not go along, and the convention would come to naught. Madison doggedly insisted anyway.

The other point about which Madison refused to compromise was that of a national legislative veto over all state laws. Madison’s diagnosis of the Confederation’s ailments put most of the blame on state governments. When not simply omitting to do their duty, he thought, they were actively thwarting Congress’s policies. A national legislature would be more trustworthy—less factious—than the state legislatures, and so could be trusted with power to negate their typically wrong-headed obstruction.⁸

7. See GUTZMAN, *supra* note 5, at 49–131 (for Madison and the Philadelphia Convention).

8. See JAMES MADISON, *Vices of the Political System of the United States*, THE FOUNDERS’ CONSTITUTION, <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html> (Madison’s summary of problems under the Articles of Confederation, which concludes with a summary of the argument about faction he is shown making in his notes of the Philadelphia Convention and laid out in detail in *The Federalist No. 10*); see generally MARY SARAH BILDER, MADISON’S

Besides being featured in Governor Randolph's opening speech, the legislative veto came to delegates' attention courtesy of their insistent Virginian colleague across the Philadelphia summer. When last he brought it up, in the convention's final week, it went down to defeat by a vote of ten states to zero. Madison put his disappointment over the rejection of his "favorite" proposal at the center of his explanation to his friend Thomas Jefferson five weeks after the convention of his reasons for thinking the Constitution, even if ratified, would fail within a few years.⁹

As he always insisted, Madison should not be considered Father of the Constitution. His and his fellow Virginia delegates' plan for a national government in the Virginia Plan did not make it through the Philadelphia conclave. The draft US Constitution featured a bicameral legislature, yes, but it would not be apportioned entirely by population, state legislatures would not lose their accustomed role in selecting legislators, Congress would not have power to legislate concerning all important questions, and it would not have a veto over all state laws. Not only that, but besides mandating that there be a supreme court, the Constitution said only that the Congress could create inferior courts if it wanted to and beyond the rarest kinds of politically-fraught cases (between states, for example) it enumerated a few kinds of cases those courts could—could—be empowered by Congress to decide.

In short, the Constitution would be a federal one, if it would be at all.

D.

The Philadelphia Convention sent the Constitution to Congress for forwarding to the states, where the Article VII ratification process could be implemented. In Congress, skeptics such as Virginia's Richard Henry Lee tried to brand the draft charter as inconsistent with the delegates' charges. Proponents of ratification such as Madison had had all they could do to have it sent along with neither praise nor criticism.

Meanwhile, the ratification campaign had already begun. Federalists—proponents of ratifying the unamended Constitution—knew they had trouble. After all, not only had two of three New York delegates (one of them the state's chief justice) left Philadelphia promising to prevent Empire State ratification, but Randolph, Mason, and Massachusetts' Elbridge Gerry had forborne signing despite staying to the convention's end. Among their stated reasons were several having to do with the national/federal issue. Mason vowed on the convention floor that he would return to the Old Dominion and work for the Constitution's rejection.

HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (that Madison actually offered this argument in Philadelphia seems dubious now).

9. Letter from James Madison to Thomas Jefferson (Oct. 14, 1787), <http://founders.archives.gov/documents/Madison/01-10-02-0151>.

New York newspapers had already carried lengthy essays forcefully critiquing the Constitution. On October 6, 1787, Pennsylvania's Philadelphia Convention delegate James Wilson responded to the public arguments with what would become the most widely disseminated rebuttal of the Antifederalist arguments: his State House Speech.¹⁰ His chief contention concerned Antifederalist insistence that a bill of rights must be added to the Constitution prior to ratification. This argument, the future Supreme Court justice held, rested on a misconception. The new government and the state governments would rest on contrary bases: while state governments had all powers their constitutions did not deny them, the new general government would have only the powers the Constitution granted it. In other words, it would be a federal government, not a national one.

Federalists up and down the continent reprinted Wilson's speech numerous times. The contending parties discussed it in several ratification conventions. Besides that, leading Federalists returned to this general argument in state after state. William Cushing made Wilson's point about the proposed central government's powers in Massachusetts, James Iredell pushed this argument in North Carolina, Framers Alexander Hamilton relayed this point to the Poughkeepsie Ratification Convention in New York, Framers Charles Cotesworth Pinckney insisted upon it in South Carolina, Framers Roger Sherman thought it odd that anyone denied the truth of Wilson's argument in Connecticut, Framers John Dickinson insisted the new government would have only the specified powers in Delaware, and two more of the leading Philadelphia Convention participants—Edmund Randolph and James Madison—made this claim a centerpiece of their case for ratification in Virginia. The chief Federalist argument was that this would be a federal, not a national government.

Antifederalists disbelieved it. They had reason to suspect the Federalists, for the Philadelphia Convention had been charged with proposing amendments to the Articles of Confederation, and it had not even considered doing so. Instead, it had taken up a proposal for a national government clearly superordinate to the state governments.

Although they were able to rush the Constitution to ratification in five states right away, Federalists encountered substantial opposition in New Hampshire and North Carolina. Antifederalist victory in Massachusetts, the next state up, might well decide the issue. Wily Federalists there lit upon a strategy: they would enlist Governor John Hancock by pointing out that in case Virginia had not ratified the Constitution by the time it was imple-

10. Notice that proponents of ratifying the unamended Constitution stole a march on their opponents, taking the name "Federalists" and dubbing their opponents "Antifederalists" when in fact they were nationalists and their opponents were federalists. George Mason objected, observing that the actual division was between proponents of ratification and its opponents—so that the two groupings might more accurately be called "rats" and "antirats." Scholars, ever prone to take government's side, have used Federalists' terminology.

mented, George Washington could not be the president and Hancock would be the obvious alternative, and they would use him as a vehicle for their offer that even in ratifying the unamended Constitution, Massachusetts Federalists would vow to seek amendments such as the Massachusetts Ratification Convention might suggest in the first Congress under the new Constitution. Governor Hancock took the bait, Massachusetts narrowly ratified, and Federalists in later ratification conventions had a new strategy to use.

E.

With that, two of the three populous states—Massachusetts and Pennsylvania—had ratified, and Virginia would take the matter up next.¹¹ The Old Dominion's debate of May–June 1788, which pitted Edmund Randolph, James Madison, George Nicholas, and their fellow Federalists against Patrick Henry, George Mason, William Grayson, and the finest cohort of Antifederalists in the country, deserves more attention than it has received. For present purposes, however, it can be summarized rather easily.¹²

Patrick Henry kicked off the Richmond Ratification Convention by pointing out that the Preamble amounted to a statement that the Philadelphia Convention had exceeded its writ. Where, he demanded, had Virginia's delegates—some of whom were in the room—obtained the right to use the language of “We, the People?” The Federalist delegate presiding said Henry's query was out of order, as the people had elected them to the convention with the idea that they might ratify the Constitution in mind. This ipse dixit put an end to Henry's salvo without by any means resolving the issue.

Repeatedly during the convention's proceedings from June 2–27, 1788, Henry fulminated against the Constitution as doing more to change the form and nature of the federal union than Virginians wanted done.¹³ Each grant of new power to the new government, each vague locution in the Constitution, drew Henry's ire. As he told it, if the Constitution were ratified unamended, the new Federal Government would claim essentially unlimited legislative power over Virginians. In time, it would become

11. For the Virginia Ratification Convention, see KEVIN R. C. GUTZMAN, *VIRGINIA'S AMERICAN REVOLUTION: FROM DOMINION TO REPUBLIC, 1776–1840*, at 83–112 (2007) and GUTZMAN, *supra* note 5, at 187–238.

12. See generally ROBERT ALLEN RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTI-FEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787–1788*, at 182–234 (1966) (for further information on the Virginia Ratification Convention); PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 255–319 (2010); 8–10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA* (John P. Kaminski, et al. eds., 1988–1993).

13. See generally HENRY MAYER, *A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REPUBLIC* (1986).

oppressive. George Mason developed this case further, asserting that federal courts would oppress the poor and Congress would provide only the shadow of representation. Both of them pointed repeatedly to the absence of a bill of rights as proof that the contemplated new government would abuse their Virginian compatriots if it were called into being before the necessary amendments' adoption.

Governor Randolph surprised the state by declaring early on in the convention that since eight of the nine states required to put the Constitution into effect had already ratified by the time Virginia's delegates assembled, amending prior to implementing the Constitution was no longer an option, and therefore he had to side with the Federalists. Here, Madison's intensive campaign to coax him into the Federalist camp bore fruit. Randolph's help proved rather uncomfortable, however, as he remained vocal about the reasons for his dissatisfaction with the Constitution as it stood.

In response to the Antifederalists, Madison carefully argued that the General Welfare Clause and the Necessary and Proper Clause served only to limit the taxing power and to ensure that the enumerated powers could be fully exercised, respectively. In other words, despite his having favored a national plan in Philadelphia and having lamented his defeat in the lengthiest letter of all his lifelong correspondence with Thomas Jefferson on October 24, 1787, Madison conceded that the Constitution was a federal, not a national, one. In fact, he made this his central contention.

Ironically, then, the Virginia Ratification Convention came down to this: Federalists, led by the Philadelphia Convention nationalists Randolph and Madison and prominent House of Delegates leader George Nicholas, argued that the Constitution was a federal one, while Philadelphia Convention non-participant (he had been elected but stayed away, explaining that he "smelt a rat") Patrick Henry and non-juror George Mason led Antifederalist delegates who bewailed the fact that it was not.

Through the entire convention, delegates remained evenly divided. Neither side felt sufficiently confident to push things to a conclusion, though Federalists thought they had a majority of the committed delegates. In response to Henry's arguments, in particular, Governor Randolph repeatedly vowed that Congress would have only the powers "expressly" granted. At the convention's end, just before the final vote on ratification, Nicholas explained that if it ratified, Virginia would be one of thirteen parties to a compact, and so its stated understanding of that act's import would bind the others. If the new government abused the powers the Constitution gave it, Nicholas insisted, Virginians could "reclaim" them.

One might have thought that Nicholas' argument followed directly from the plain language of Article VII of the Constitution: "The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same." Yet, time would tell.

Ultimately, Virginia ratified the Constitution by a vote of 89–79. Prior to the final vote, Henry vowed that he would abide by the majority’s decision, whatever it might be. While historians commonly credit Federalist delegates with the narrow success of their cause, Antifederalist delegate James Monroe wrote the night of the final vote that George Washington’s known advocacy of the Constitution had “carried this government.” Although Henry kept his word regarding extralegal resistance, he also exercised his control over the Virginia General Assembly to ensure that prominent Antifederalists William Grayson and Richard Henry Lee, not James Madison, represented Virginia as senators in the First Congress. Henry also led the way in drawing Madison a congressional district that included Monroe’s home.

III.

Madison thus found himself in a closely-contested House election.¹⁴ Despite his preference, he had for the first time to mount rostra all over his district and address assemblages of local farmers. Among other things, he assured them that he would work to add amendments to the Constitution insulating Baptists’ and others’ religions from federal interference. Narrowly elected, Madison worked in the House—despite his colleagues’ resistance—to fulfill this promise.

The twelve amendments Madison prompted Congress to propose for the states’ ratification have been the subject of substantial dispute in the past century. Of particular note has been the place of federalism (aka states’ rights) in the original constitutional model. Close acquaintance with Congress’s work, however, leaves no doubt that federalism underlay them all.

Madison’s initial proposal included an early version of what became the Tenth Amendment, as well as the religion provisions he had promised his constituents and a provision barring state governments’ infringement of the freedom of the press, the right to trial by jury, and freedom of conscience. By the time Congress was through with these, the proposal concerning state governments’ behavior—which would have augmented the Federal Government’s power vis-à-vis state governments—had been dropped, and the third proposal—which became the First Amendment—began by saying, “Congress shall make no law. . . .”¹⁵ If that were not enough to seal the case that federalism underlay all of the proposed amendments, Congress sent them to the states with a Preamble saying they were being proposed to calm worries that had arisen during the ratification cam-

14. GUTZMAN, *supra* note 5, at 239–278.

15. Madison’s initial proposal is Madison Resolution, June 8, 1789. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11–14 (Helen E. Veit et al. eds., 1991).

paign over the perception that the limits of the new government's authority were unclear.¹⁶

IV.

As Congress created the Bill of Rights, it also dealt with the more pressing tasks of creating the federal Judicial and Executive Branches. Article III of the Constitution said there would be a supreme court with a chief justice "and such inferior courts as Congress from time to time [might] ordain and establish." Although it did not follow up on Madison's pledge to give the new government a go without inferior courts, it did, in the Judiciary Act of 1789, create a remarkably decentralized federal judicial system. Yes, Section 25 provided for appeal of federal questions from state supreme courts to the US Supreme Court, but the law in a diversity case would be the forum state's law, each state would have at least one US district court, and a substantial amount-in-controversy requirement would limit the federal courts' diversity jurisdiction.

V.

A.

Far more pressing was the creation of the Executive Branch, which counted precisely one official when George Washington took his hand off the Bible after reciting the presidential oath of office. Congress hurriedly established the Departments of State, the Treasury, and War, along the way instructing the as-yet-unnamed secretary of the treasury to submit a report outlining a proposed financial plan. As soon as Alexander Hamilton took office as the first such secretary, he quickly got about the business of doing precisely that.¹⁷

Among the notably British-inflected proposals Hamilton made was that the Federal Government should assume responsibility for all of the state governments' war-related debts. Surveying the financial landscape, he realized that while constitutionally the US Government bore no responsibility for Delaware's or (most significantly) Rhode Island's debts, as a practical matter European lenders were apt to downgrade American debt in general if some state government defaulted. This could best be avoided, he reasoned, by sweeping all thirteen state government debt accounts into one giant Federal Government account.

As a financial matter, Hamilton's policy proposal proved a smashing success: the interest borne by American bonds declined markedly as soon as Assumption of State Debts became known in Europe. On the other hand,

16. THOMAS E. WOODS, JR. & KEVIN R. C. GUTZMAN, *WHO KILLED THE CONSTITUTION? THE FATE OF AMERICAN LIBERTY FROM WORLD WAR I TO GEORGE W. BUSH* 215 (2007).

17. For the clearest account of Hamilton's program as Secretary of the Treasury, see generally FORREST McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* (1979).

Hamilton's proposal provoked unease among significant Virginians concerning the vector of Hamiltonian policy and political science.

Assumption passed through Congress relatively easily. Yet, it drew the ire of the Virginia General Assembly. In that, America's most storied legislative body, former Antifederalist generalissimo Patrick Henry and one-time Richmond Ratification Convention Federalist Henry "Light-Horse Harry" Lee responded to Assumption with a legislative resolution.¹⁸ Assumption and another of Hamilton's initiatives, funding of the debt, were "repugnant to the constitution" and "dangerous to the rights and subversive of the interests of the people." Virginia had ratified the Constitution only on the condition that Congress's powers would be limited to those expressly granted. Nothing in the Constitution expressly gave Congress power to assume state debts. Virginia would be watchful lest Congress undertake to oppress Virginians through further arrogations of powers reserved to the states.

B.

By year's end, Madison—who, remember, was in the House due to Henry's machinations—had taken up the same argument in Congress.¹⁹ Hamilton's Bank Bill could not be squared with the Constitution, the congressman insisted, because nothing in Article I, Section 8 gave Congress power to issue a bank a charter. The bill's proponents argued that the General Welfare Clause and the Necessary and Proper Clause could be used for this purpose, but Madison denied it: the General Welfare Clause must be read as tying the taxing power to the enumeration of specific congressional powers immediately following it, while the proposed bank could hardly be called necessary to the exercise of any of the powers listed in Article I, Section 8. Power to charter corporations remained entirely with the states.

With the Bank Bill's passage, President Washington faced a serious constitutional problem: what to make of Madison's argument in the House. Given the congressional margins in favor of Hamilton's proposal, any other congressman's opposition would probably have been sloughed off. Madison, however, had played a unique role in establishing the Constitution and the new Federal Government, not only taking the lead in persuading Washington to attend the Philadelphia Convention and drafting his First Inaugural Address, etc., but also lending his expert advice in staffing the major federal offices—including advocacy of nominating Hamilton for secretary of the treasury.²⁰ Thus, Madison's arguments must have impressed the president.

18. GUTZMAN, *supra* note 5, at 273.

19. *Id.* at 256 *et seq.*

20. STUART LEIBIGER, *FOUNDING FRIENDSHIP: GEORGE WASHINGTON, JAMES MADISON, AND THE CREATION OF THE AMERICAN REPUBLIC* 58–123 (1999).

In 2017, for President Donald Trump to hold Cabinet meetings on the subject of whether to veto his administration's leading pending initiative would be exceedingly odd. In 1790, however, George Washington had a different understanding of the presidency than we.²¹ Washington seems to have accepted the idea that the veto power gives the president the duty of ensuring that the Congress not overstep the bounds of its delegated authority. He held several Cabinet discussions of the Bank Bill to gather his top advisors' considered opinions on the subject.

Famously, the four-man Cabinet split into two groups, with Secretary of the Treasury Hamilton, supported by Secretary of War Henry Knox, advising that the president sign the bill and Secretary of State Jefferson and Attorney General Randolph urging that he not do so. When Washington asked them for written opinions, Jefferson and Hamilton gave him classic accounts of the federal and the national, which is to say of the states'-rights and the liberal, approaches to constitutional interpretation.

Jefferson usually receives credit for the argument he offered, but he borrowed it wholesale from Madison. Randolph's resembled them both—unsurprisingly, in light of Randolph's role in the Richmond Ratification Convention. Essentially, Jefferson began by saying that he understood the Constitution's underlying principle to be that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (He called this the 12th Amendment, as it would have been if the states had then ratified all twelve of the proposed amendments pending before them. We know it as the 10th.)

The states, as Jefferson had it, had created the Federal Government by delegating it a few enumerated powers. In case it tried to exercise power not delegated, he said, Congress's act was essentially non-existent. He made short shrift of the notions that the General Welfare Clause and the Necessary and Proper Clause gave Congress unenumerated power to enact that Bank Bill. In regard to the latter clause, he pointed out that chartering a bank was not *necessary* to the exercise of any of Congress's enumerated powers.

Hamilton replied to the opposite effect, just as his allies had done in the House debate with Madison. Washington's signature on the Bank Bill erected the First Bank of the United States, but it did not write *finis* to Jefferson's cause.

Following as it did so close upon the heels of the Assumption controversy, Hamilton's Bank Bill spurred a growing feeling among certain politicians, Madison and Jefferson prominent among them, that Hamilton had

21. For an explanation of the differences between Washington's—the first six presidents'—conception and ours, see generally RALPH KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789–1829* (1984).

ulterior motives. It seems to have been about this time that Madison shared at least portions of his notes of the Philadelphia Convention, particularly the notes of Hamilton's June 18, 1787, speech proposing a new constitution for the United States, with Jefferson. Thus, even before Hamilton took the anti-Francophilic position in the debate culminating in President Washington's Neutrality Proclamation (1793), members of the budding Republican Party had him pegged as a not-so-secret monarchist.

C.

At about this time, the Supreme Court got into the act. Chief Justice Jay, Justice James Wilson, and other justices handed down the Court's first significant decision in the case of *Chisholm v. Georgia* (1793).²² The case involved a South Carolina citizen's suit against Georgia for money due a decedent for whom the plaintiff served as executor. Georgia refused to appear, relying on a claim of sovereign immunity, but Jay and Wilson carried the day with their seriatim opinions reasoning that someone had to have jurisdiction over this type of case, and the Supreme Court was the obvious institution to have it.

No sooner had this decision been made public than Congress hurriedly drafted a constitutional amendment to negate it. The 11th Amendment by its terms says only that federal courts will not have jurisdiction over this type of litigation, but the underlying principle is greater: the Constitution is a federal one, and federal courts, like Congress, can be given by Congress only the powers (in the courts' case, the types of jurisdiction) enumerated therein.

VI.

A.

Between the Supreme Court's decision in *Chisholm* and the conclusion of the ratification process in 1798, developments in foreign policy brought the dispute over the locus of sovereignty in the American system to a head. First, in response to a circular letter from Vice President Thomas Jefferson's congressman, Samuel Cabell, to his constituents, the federal grand jury in Richmond handed up a presentment for seditious libel.²³ Jefferson, furious, quickly dashed off a petition for his Albemarle County, Virginia neighbors calling upon the General Assembly to impeach the federal grand jurors.

22. 2 U.S. 419 (1793).

23. The story is laid out in detail in GUTZMAN, *supra* note 3, at 44–46.

I.

Jefferson's argument, familiar by now, was that the US Constitution created a limited government with a few enumerated powers, and that staunching the communication of ideas from a Virginia congressman to his Virginia constituents was not among them. Besides, he added, the right to communicate this way was inherent in the right of representation. It was prior to the Constitution altogether. While vindicating Representative Cabell's rights was up to Congress, protecting Virginians' right to communicate freely with their members of Congress against common Virginians sitting on a federal grand jury was the state legislature's responsibility. It should impeach them and bar them from ever again holding office in Virginia.

2.

Jefferson's friend James Monroe had only recently entered upon the gubernatorial office when Jefferson took up this cause. Sent the petition by his former instructor in law, Monroe pointed out to Jefferson that this matter seemed more appropriately Congress's than the General Assembly's concern. Jefferson conceded that this might commonly be true, but in such an extreme case, when Congress could not be expected to intervene, extreme measures were required. Ultimately, one house of the General Assembly agreed with Jefferson, but the other never did, and so his petition did not rouse the Old Dominion's government to assert its authority against the US Government.

That would come the following year.

B.

Persuaded that organized opposition to its policies amounted to anti-constitutional conspiracy, the Federalist Party in 1798 undertook to pass four laws: an immigration reform and the Alien and Sedition Acts.²⁴ The first of them responded to newcomers' tendency to jump onto the Jeffersonian bandwagon as soon as they arrived in America. As many of the 1790s' new arrivals came either from Ireland or from Francophone Europe, this is no surprise. Federalists responded to this trend by extending the period of legal residency required prior to citizenship to fourteen years—still the longest such period in American history.

The Alien and Sedition Acts took aim at Republicans as well. The first of them, the Alien Enemies Act, gave the president authority to imprison or expel hostile aliens. It remains in effect today, and it has been used numerous times by several presidents, perhaps most notably by Democrat Franklin Roosevelt in imprisoning Italians during World War II.

24. See GUTZMAN, *supra* note 5, at 113–134 (the Alien and Sedition Acts Crisis).

The other two were far more controversial. First, the Alien Friends Act empowered the president to identify and expel dangerous aliens. Second, the Sedition Act joined its ban on sedition to a ban on saying anything that tended to bring the Federal Government into ill repute.

C.

Republicans responded to this suite of laws by going further down the road of state resistance than Jefferson had envisioned in his 1797 legislative petition. Meeting at Monticello in summer 1798, the Virginia Republican high command sketched out two sets of legislative resolutions explaining why they held these laws unconstitutional and threatening to take additional action if they were not repealed.²⁵ One of those sets of resolutions, drafted by Vice President Jefferson, made its way to Kentucky for adoption by that state's legislature. The other, drafted by former congressman Madison, became the official position of the Virginia General Assembly.

1.

Jefferson's resolutions began with the observation that he understood the Constitution's underlying principle to be that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." He went on to say that the states entered into the federal union on the understanding that the new government would have only the enumerated powers, and since there was no superior power superintending the members of a federal union, it remained for each state finally to ensure that the Constitution was being properly observed by their creature: the Federal Government. In case it was not, "a nullification is the rightful remedy," he insisted. The Kentucky Legislature found this last assertion a bridge too far in 1798. Still, the balance of the Kentucky Resolutions made that state's pugnacious posture clear.

2.

More importantly, Virginia adopted similar resolutions in 1798. We sometimes forget how significant Virginia was in American politics in the Constitution's first decade. Suffice to say that besides being the home state of Washington, Jefferson, Madison, Randolph, et al., the Old Dominion also accounted for 21 of the 138 members of the Electoral College, which made it easily the most influential state (and accounts for its most prominent politicians' enduring national fame). (A state with the same share of today's Electoral College would have 83 electoral votes—one less than the sum of California's 55 and Florida's 29.)

25. For a complete revisionist account of the Virginia and Kentucky Resolutions, see *id.*

Like the Kentucky Resolutions, the Virginia Resolutions were drafted anonymously. This made sense in light of the Sedition Act. Not until ten years later would John Taylor of Caroline, their House of Delegates sponsor, disclose in a public feud with a newspaper editor that not he, but Madison was their draftsman. (Jefferson's role in drafting Kentucky's resolutions remained secret longer still.)

Taylor took Madison's draft and interlineated the claim that if the Federal Government adopted an unconstitutional and dangerous policy, it was "null, void, and of no force or effect." When Madison heard about this, he acted to have that phrase excised. Scholars commonly say that this made Virginia's resolutions more moderate than Kentucky's.²⁶

They overlook the most obvious evidence: the record of the debate in the House of Delegates. Rather than deleting the offending language lest the document be too radical for Madison's taste, the majority Republicans accepted James Barbour's argument that to make this change could not hurt anything, because the resolutions would still refer to the Alien and Sedition Acts as "unconstitutional," and that was the same as "null, void, and of no force or effect." Even Taylor, who for years had been calling on Jefferson, Madison, and James Monroe to use the General Assembly as a mechanism for resisting federal overreaching, went along. In short, the change was not understood by the Virginia Resolutions' sponsors as making the document less confrontational at all.

Besides using the word "unconstitutional," which the resolutions' proponents held to be interchangeable with "null, void, and of no force or effect," the third Virginia resolution said that in case the Federal Government adopted an unconstitutional and dangerous policy, states could prevent its enforcement within their "respective" territories. What means the states would use to achieve this end, the General Assembly did not say. They did say that in such a situation, "the states have the right, and are in duty bound, to interpose."

Decades later, in the throes of the Nullification Crisis, James Madison explained these resolutions as rather inoffensive.²⁷ *Pace* the South Carolina Nullifiers, he held, Virginia had in 1798 never said that an individual state could act to thwart federal policy. "Interposition" meant no more than adopting resolutions or voting Republican.

3.

Recent scholarship has proven dispositively that this is untrue: in response to Virginia's and Kentucky's call, Georgia adopted a resolution of

26. For contemporary scholars' handling (ignoring) of the evidence, see GUTZMAN, *supra* note 3, at 53–54.

27. See generally Kevin R. Gutzman, *A Troublesome Legacy: James Madison and "The Principles of '98"*, 15 J. EARLY REPUBLIC 569 (1995).

its own declaring that the Alien and Sedition Acts were unconstitutional.²⁸ In the course of casting its constitutional judgment, the Georgia Legislature added that it hoped this would be enough, and it would not have to interpose. Clearly, then, interposition was not resolving or voting.

The Tennessee Legislature responded positively to the Virginia and Kentucky Resolutions of 1798 as well, like Georgia adopting a resolution holding the Alien and Sedition Acts unconstitutional. One house of the North Carolina Legislature voted to endorse Virginia's, while the other disagreed.

4.

From north of Virginia, however, the response was entirely negative. Most forceful in their rejection of Republican principles were Massachusetts and its little brother Connecticut, which held that they liked the Alien and Sedition Acts, they wished the laws had been passed sooner, and they hoped to see additional prosecutions. Among the constitutional points they made, pride of place went to the claim that not state legislatures, but federal courts had the authority to pass on important constitutional issues.

5.

The Virginia Republicans decided not to let these negative assessments of their case go unanswered. For Kentucky, Jefferson sketched out a new set of resolutions refuting Federalist legislatures' criticisms. Along the way, these Kentucky Resolutions of 1799 said that Kentucky loved the federal union and would be among the last to secede. While prominent Virginia congressman William Branch Giles had floated that idea in public in 1798, no official document contemplated the possibility before 1799.

Meanwhile, back in the Old Dominion, James Madison decided to leave his years-long political retirement—not for a new seat in Congress, but for a place in the House of Delegates. His two-year tenure there would have three significant products: 1) a new law establishing winner-take-all allocation of Virginia's Electoral College votes; 2) election of his and Jefferson's close ally James Monroe as Virginia's governor heading into the election of 1800 (Virginia governors were under George Mason's 1776 constitution elected by the legislature); and 3) an extended refutation of Federalists' constitutional position, the *Report of 1800*.²⁹

In general, "Madison's Report" (as it came to be known) applied Jeffersonian constitutional principles to the entire record of Federalist Party administration since George Washington's inauguration in 1789. The Bank

28. See generally WENDELL BIRD, *PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT* (2016).

29. GUTZMAN, *supra* note 5, at 276.

Bill, the Neutrality Proclamation, the Alien and Sedition Acts, and more besides find their place in Madison's carefully reasoned demolition of the opposing party. Most significant is what he says about ratification.

In response to Federalist assertions that the Virginia and Kentucky Resolutions erred in stating that the states ratified the Constitution, because the people did, Madison carefully explained what the two states meant. The word "state," he said, is susceptible of several different definitions. It could refer to a state's territory, say, or to its government. It also might refer to the sovereign people of the state, as when Article VII held that, "The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same." Virginia and Kentucky had used the word in that sense in 1798, and Madison—Virginia—was frankly surprised to find other states disputing their claim that the states ratified the Constitution.

D.

Meanwhile, former treasury secretary Alexander Hamilton counseled that the army be used to intimidate Virginia Republicans from resisting the law and the federal judiciary enforced the Sedition Act with a vengeance.³⁰ More than one Supreme Court justice riding circuit went to great pains to encourage local federal grand and petit juries to apply the law with vigor. Several significant Republicans went to prison and paid stiff fines under the law, including a congressman.³¹

I.

The congressman, Matthew Lyon of Vermont, was charged with sedition for "uttering political opinions critical of President Adams and the Federalist administration" during the 1798 election campaign, as the chief authority on the matter put it.³² Lyon argued in his own defense that the Sedition Act was unconstitutional, that the matter for which he was accused had been written before the Act's adoption, that he had not published any of the things allegedly violative of the Act with the requisite "bad intent," and that everything he was accused of saying was true—and thus fell under the Act's truth exception.

In his charge, Justice William Paterson instructed the jury that the question of constitutionality was not for a jury. The issues before them were whether Lyon had said the things he stood accused of saying and whether

30. Letter from Alexander Hamilton to Theodore Sedgwick (Feb. 2, 1799), <https://founders.archives.gov/documents/Hamilton/02-11-02-0267>.

31. See generally PETER CHARLES HOFFER, *THE FREE PRESS CRISIS OF 1800: THOMAS COOPER'S TRIAL FOR SEDITIOUS LIBEL* (2011); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973); JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956).

32. SMITH, *supra* note 31, at 231.

he had done so with the requisite bad intent. Lyon conceded the first point, Paterson continued, and that left only the second.

Along the way, Paterson also intimated that some of the evidence submitted by Lyon—a letter by the poet Joel Barlow—was forged. So fine a poet could not have written such a letter, he asserted. Nothing Paterson said even hinted at the idea that political opposition could be legitimate, the fact that truth was expressly made a defense by the Sedition Act itself, or that acquittal was possible. Lyon’s conviction gave Paterson the opportunity to impose a sentence of four months’ imprisonment and a \$1,000 fine, besides assessing \$60.96 in court costs. On hearing of it, Vice President Jefferson told John Taylor of Caroline, “I know not which mortifies me most, that I should fear to write what I think or my country bear such a state of things.”³³

2.

a.

In another notorious case, prominent intellectual Thomas Cooper found himself thrown into prison for having dared to impugn the Adams Administration.³⁴ A notable Cooper newspaper editorial began by accusing the Federalists of trying “to stretch to the utmost the constitutional authority of our Executive, and to introduce the political evils of those European governments whose principles we have rejected.” He went on to say that if he were a president who desired to undermine the Constitution, he would grab at the states’ reserved power to undermine the federal principle and wage a verbal battle with any state government or official who resisted this campaign. Public critics of federal officials would themselves be criticized, he would employ laws against libel and sedition to this purpose, and all critics would be labelled “as dangerous and seditious, as disturbers of the peace of society, and desirous of overturning the Constitution.”

His chief “instrument of despotic ambition,” however, would be “a standing army . . . and a naval armament.” History showed, after all, that “in no instance whatever has a standing army, regularly maintained, failed of rendering the governing powers independent of the people.” Not least among the “positive” effects of such a military would be the desuetude of the militia, which were the people’s chief instrument of self-defense. Besides that, such an establishment would give the president offices and contracts for his friends to go with the means of suppressing his enemies.

President John Adams, according to Cooper, was not his target—though Adams had attacked popular sovereignty, free principles, and the

33. Letter from Thomas Jefferson to John Taylor (Nov. 26, 1798), <https://founders.archives.gov/documents/Jefferson/01-30-02-0398>.

34. My account of the Cooper matter relies on SMITH, *supra* note 31, at 307–333 and HOFFER, *supra* note 31.

rights of man. Expansion of the army and navy and enactment of the Alien and Sedition Acts, he concluded, should spur Americans to resist.³⁵

When he learned of Cooper's essay, President Adams wrote that, "As far as it alludes to me, I despise it; but I have no doubt it is a libel against the whole government, and as such ought to be prosecuted." Cooper was not prosecuted at that point, but Adams was now aware of him. Soon enough, an answer to Cooper's attack saw print. It included the fact that Cooper had applied to Adams for a political appointment in 1797—a fact that could only have come from Adams.

b.

Cooper replied in a handbill which would become the basis of his prosecution under the Sedition Act. He said that in his application to Adams he made clear that he was a Republican and would remain so. He added that there was nothing untoward in a Republican's applying to Adams for a public post at that time, as Adams had not yet signed an Alien Act depriving certain people of trial by jury or a Sedition Act screening his public behavior from criticism. "Nor were we yet saddled with the expense of a permanent navy, or threatened under his auspices with the existence of a standing army," Cooper continued.

Turning to a notorious legal matter, Cooper said:

Mr. Adams had not yet . . . interfered as president of the United States to influence the decisions of a Court of Justice. A stretch of authority which the Monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy! This melancholy case of *Jonathan Robins*, a native citizen of America, forcibly impressed by the British and delivered up with the advice of Mr. Adams to the mock trial of a British court martial, had not yet astonished the republican citizens of this free country.

c.

Cooper was arrested on April 9, 1800 and charged with seditious libel—one authority says at President Adams' insistence.³⁶ Cooper requested that the president be subpoenaed so that Cooper could show that Adams was responsible for the publication to which Cooper had had to reply with the negative public characterizations of Adams' behavior, which Cooper intended to use as proof he had not manifested the requisite mental state to violate the law. Justice Samuel Chase refused to issue a subpoena to President Adams, holding that Cooper had no right to make him appear. Chase also refused to grant Cooper an extension of time to obtain copies of Ad-

35. For Cooper's argument, see SMITH, *supra* note 31, at 308–309.

36. HOFFER, *supra* note 31, at 80.

ams' correspondence related to the XYZ Affair, which had been the subject of some of Cooper's criticism of Adams. Chase explained that Cooper should have been more careful than to make charges against the president he could not prove.

Chase allowed Secretary of State Pickering to sit on the judges' bench during Cooper's trial. Perhaps he knew that Pickering had instigated the prosecution. Other members of Adams' Cabinet also attended, as did Rep. Robert Goodloe Harper, the author of the Sedition Act's relevant section. The prosecutor, William Rawle, had also prosecuted the Whiskey Rebels and John Fries in the Federal Government's only previous treason trials. Rawle argued that allowing criticism of government such as Cooper had leveled would lead to insurrection.

Cooper made two arguments in his own defense: first, that his assertions had all been true, which brought them under the statute's truth defense; and second, that because his argument had begun by disclaiming the idea that Adams had any improper motive, Cooper's intention could not have been to spur opposition to the government. His argument, Cooper insisted, had been solely political. Besides that, Cooper insisted, he had only entered the lists in this connection at all because the newspaper article including Adams' information had accused Cooper of a "base and cowardly slander."

Cooper attempted to call two character witnesses to show that he was not the type to commit the crime of which he stood accused. Justice Chase interrupted him. "This is not necessary," the judge said, "It is your conduct not your character that is in question. If this prosecution were for a crime against the United States, you might give evidence to your character and show that you have always been a good citizen, but this is an indictment for a libel against the President, where your general character is not in question." Chase was wrong: the charge was a crime against the United States, not against the president. Still, Cooper did not press the point.³⁷

In his charge to the jury, Justice Chase essentially assumed Cooper's guilt. The statute required that the government prove the publications to be false, scandalous, and malicious, but Chase said the government had proven Cooper's bad intent. "He justified the publication in all its parts," Chase told the jury, "and declares it to be founded in truth." Perversely, Chase turned Cooper's strategy of using the law's provision concerning the innocence of truthful statements against Cooper.³⁸

Besides that, Cooper had said of his publication that it would inform the people of Adams' intentions before the next election. This, Justice Chase intoned, showed that Cooper intended his publication to turn the people against the president in time for him to suffer an election defeat.

37. *Id.* at 106–107.

38. SMITH, *supra* note 31, at 325–326.

In conclusion, Chase called Cooper's publication a "gross attack" on Adams: "Take this publication in all its parts," he said, "and it is the boldest attempt I have known to poison the minds of the people. . . . This publication is evidently intended to mislead the ignorant, and inflame their minds against the President, and to influence their votes on the next election." Thus instructed, the jury quickly found Cooper guilty. In light of Chase's performance, the crime seems to have been intending to make President Adams look like a worse presidential candidate than Vice President Jefferson.

Justice Chase was not done with Cooper yet. In the sentencing phase of the trial, he told Cooper that although he typically did not fine a man more than he was able to pay, in this case suspicion that other Republicans (whom he called the party "against the government") would help raise the money for his fine led Chase to require that Cooper pay \$2,000. When District Judge Richard Peters objected that party considerations should not affect the convicted man's penalty, Chase put the question off. In the end, Cooper was fined \$400 and made to post a \$2,000 surety bond. In addition, he would be imprisoned for six months.

3.

a.

The most attention-grabbing case under the Sedition Act, however, was the Richmond trial of journeyman muckraker James Callender. Callender published a book, *The Prospect Before Us*, replete with caustic aspersions upon John Adams. Having read it while riding circuit, Justice Chase told an attorney in Maryland that he "would carry it to Richmond as a proper subject for prosecution," that "before he left Richmond he would teach the people to distinguish between liberty and licentiousness of the press," and "that if the Commonwealth or its inhabitants were not too depraved to furnish a jury of good and respectable men, he would certainly punish Callender."³⁹

En route to Richmond, Chase encountered a stranger, James Triplett. According to Triplett, Chase showed him the book and inquired of his knowledge, if any, concerning Callender. Triplett testified that he had told Chase of a rumor that Callender had been arrested for vagrancy, and that Chase replied, "it is a pity you have not hanged the rascal." ("Rascal" in the late eighteenth century was an extreme epithet the use of which sometimes led to duels.) The Federal Government, Chase continued, showed "too much leniency towards such renegadoes." A couple of days later, encountering Justice Chase in the Richmond courthouse, Triplett learned from Chase that he would have "the pleasure of seeing Callender" the next day.

39. BERGER, *supra* note 31, at 232 *et seq.*

That was when the trial began. It could have begun later, but Chase denied Callender the continuance his counsel requested. In doing so, Chase laid down the rule that an author before publishing should have documents and out-of-state (in this case, New Hampshire, Pennsylvania, and western Virginia) witnesses at hand. Chase stated in denying the continuance that “the ordinary sittings of the court would be too short for him to obtain witnesses from so great a distance . . . he [Chase] could not allow him [Callender] to the next term.”⁴⁰

b.

Chase’s abusive conduct continued into the trial. When counsel for Callender called former senator John Taylor of Caroline to the witness stand, Chase immediately intervened to ask what he hoped to prove by the witness, saying, “No evidence is admissible that does not go to justify the whole charge.” Called to comment on the matter at Chase’s impeachment trial, the very pro-Chase witness Chief Justice John Marshall said that he had never encountered this idea before. In fact, the idea was completely contrary to the law of evidence.⁴¹

Chase also levelled serious aspersions against Callender’s counsel during the trial. At one point, he said that these “young gentlemen” were offering “a popular argument, calculated to deceive the people, but very incorrect [Y]ou have all along mistaken the law, and impress your mistakes upon the court.” One struggles to conceive how a judge could more seriously undermine counsel’s impression upon the jury than by first accusing them of attempting to deceive the jury and then asserting that they had a mistaken understanding of the law. Chase also mocked defense counsel consistently. Chase’s counsel conceded at his impeachment trial that Chase had displayed “mirth,” “humor,” and “facetiousness” at the trial. John Taylor of Caroline, who was an attorney, testified that Chase’s humor had been “extremely well calculated to abash and disconcert counsel.” Chase also interrupted them continuously, so that the clerk of court and defense counsel all later testified that his behavior had in this regard been highly unusual.⁴²

In the end, Callender’s lawyers quit the case.

c.

Raoul Berger concludes his indictment of Chase by noting that the Judiciary Act of 1789 included both a statutory injunction to administer justice impartially and a requirement that justices of the Supreme Court

40. *Id.* at 236 n.56.

41. *Id.* at 236–238; *Testimony in the Trial of Samuel Chase*, in 6 THE PAPERS OF JOHN MARSHALL 354 (Charles F. Hobson, et al. eds., 1990).

42. BERGER, *supra* note 31, at 244–246.

swear to do so. Chase entered upon the Callender matter with a strong prejudice, conducted the proceedings in a prejudiced manner, and seated petit jurors who confessed they were biased against the defendant.⁴³

Ultimately, Chase got his conviction. He sentenced Callender to nine months in prison and a \$200 fine, then bound him over to good behavior for two years.⁴⁴

VII.

Federalist judges' enthusiastic enforcement of the Alien and Sedition Acts accounts in large part for the Virginia and Kentucky Resolutions of 1798, Kentucky Resolutions of 1799, and Virginia Report of 1800, besides the associated resolutions of the Tennessee and Georgia legislatures. Although they implored people in other states to join in protesting Federalist constitutional abuses, Jeffersonians believed that the political fever would pass soon after the taxman made clear exactly how much Federalist military preparations cost.⁴⁵

They proved right. John Adams and his congressional allies lost the 1800 elections. They still had more than four months in office, however, and they made the most of it by passing the Judiciary Act of 1801. That law significantly expanded the judiciary just in time for the repudiated President John Adams and his fellow repudiated Federalists in the Senate to fill the new judicial posts with Federalists.⁴⁶ Tipping their hand, the Act's authors also prospectively cut the Supreme Court's size from six to five—obviously so that Thomas Jefferson would not get to replace the first Federalist to retire from that tribunal during his presidential tenure.⁴⁷

A.

The new Republican Congress addressed that hated law with its Repeal Act of 1802. Congressional deliberations and public discussion of the Repeal Act featured abundant Republican aspersions upon federal judges, including both lamentations of their biased behavior and denunciations of them for their indiscretions.⁴⁸

43. *Id.* at 238.

44. HENRY H. SIMMS, *LIFE OF JOHN TAYLOR: THE STORY OF A BRILLIANT LEADER IN THE EARLY VIRGINIA STATE RIGHTS SCHOOL* 98 (1932).

45. Letter from Thomas Jefferson to John Taylor of Caroline (Nov. 26, 1798), in 30 *THE PAPERS OF THOMAS JEFFERSON, 1 JANUARY 1798–31 JANUARY 1799*, at 588–590 (Barbara B. Oberg., ed., 2003), <https://founders.archives.gov/documents/Jefferson/01-30-02-0398>.

46. Well, not entirely with Federalists. See Richard A. Samuelson, *The Midnight Appointments of John Adams*, 7 *WHITE HOUSE HIST.* 14, 14–25 (2000).

47. See generally R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 152–153 (2001).

48. *Id.* at 153.

The Republicans' counter-reformation of the federal judiciary raised a substantial constitutional question in the minds of the Federalists.⁴⁹ That question, foremost plank of a petition presented to Congress by eleven of the circuit judges appointed under the Judiciary Act of 1801, was whether abolishing judicial positions did not violate Article III, Section 1 of the Constitution, which famously guarantees federal judges tenure "during good behaviour."

B.

Perhaps unsurprisingly, the most forceful surviving argument by a federal judge for the law's unconstitutionality came from Justice Chase.⁵⁰ In a lengthy missive to his colleague Marshall, Chase insisted that the Supreme Court should void the law as unconstitutional. "The distinction of taking the Office from the Judge, and not the Judge from the Office, I consider as puerile, and nonsensical," he confided. Since there were circuit judges already, then, justices could not now ride circuit. Chase added that on considering the matter, he would have thought it unconstitutional for the justices to resume riding circuit even without the imbroglio over the Judiciary Act of 1801; it seemed that the Constitution intended for inferior courts and the Supreme Court to be staffed with different judges.

C.

Marshall tended to agree with Chase's argument concerning riding circuit in coming sessions, though reluctantly.⁵¹ In fact, after hearing from Justice Bushrod Washington that he disagreed with Chase and him, Marshall decided that "policy dictate[d]" acquiescence in the new organization of the judiciary.⁵² Soon enough, Justice Paterson passed along the news that Justice William Cushing would willingly ride circuit if the rest did.⁵³ Chase was outvoted.⁵⁴

Ultimately, in *Stuart v. Laird* (1803), the Court upheld the Repeal Act. It did so on the basis of a very broad reading of Congress's Article III, Section 2, clause 2 power to structure the Judiciary. Having justices ride circuit, Justice William Paterson (a chief author of both Article III and the Judiciary Act of 1789) intoned, lay within Congress's constitutional discretion. Years of precedent had settled the question. When Congress un-

49. See *id.* at 154–157.

50. See Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in 6 THE PAPERS OF JOHN MARSHALL 109–115 (Charles F. Hobson et al. eds., 1990).

51. See Letter from John Marshall to William Paterson (Apr. 19, 1802), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 50, at 108–109.

52. Letter from John Marshall to William Paterson (May 3, 1802), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 50, at 117.

53. See Letter from William Paterson to John Marshall (June 18, 1802), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 50, at 121.

54. See *id.*

limbered its impeachment guns against the Federalist judiciary, it would not be over this question.

VIII.

Stuart v. Laird was handed down six days after *Marbury v. Madison* (1803).⁵⁵ If Marshall's court kept its collective head down in the former case, it levelled a heavy broadside against President Jefferson and his chief advisor and ally in the latter.⁵⁶

A.

Looking back on his career from the vantage of retirement, Jefferson explained the situation giving rise to *Marbury*.⁵⁷ Upon taking office, he said, he had found a stack of judicial commissions awaiting delivery in the State Department. He immediately decided not to deliver them. The Judiciary Act of 1801 offended his constitutional (not to mention, one imagines, his partisan) sensibilities, and so he would not do so.

Nor, indeed, did Jefferson think he had to. A deed was not valid until delivered, he reasoned, and so those commissions were not vested until received. If he kept them, the appointees would never obtain a right to their offices. This account is tinged with resentment, for John Marshall's opinion in the case reasoned to precisely contrary effect.⁵⁸

B.

Where nowadays a federal suit begins with jurisdictional pleading, Marshall in his opinion for the Court took up the merits of the case first, then at last came to the jurisdictional issue. This gave him the opportunity to unburden himself of a stinging lecture concerning the equities of the matter.⁵⁹

According to Marshall, the Constitution established a two-part system for appointment to judicial office: first the president nominated a candidate, and then the Senate gave its consent. In the case of William Marbury and his fellow complainants, Robert T. Hooe and Dennis Ramsay, both parts had been performed.⁶⁰ Marbury, said the chief justice, had a right to the petty office he wanted.

55. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

56. Except where noted, the following account of *Marbury* is based on KEVIN R. C. GUTZMAN, *JAMES MADISON AND THE MAKING OF AMERICA* 285–287 (2012).

57. See Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), <https://founders.archives.gov/documents/Jefferson/98-01-02-0734>.

58. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1919).

59. *Id.*

60. For the co-complainants, see Charles F. Hobson, *Editorial Note* to 6 THE PAPERS OF JOHN MARSHALL *supra* note 50, at 160–164.

Was there a legal remedy for a situation in which a right had vested but a high executive official—in this case, Secretary of State James Madison—refused to deliver the commission? There was: a writ of mandamus.

Rather than ordering that it be delivered, however, Marshall said that Congress had erred in assigning the Supreme Court the task of hearing suits for mandamus in matters such as this. Hearing such cases as original matters did not fall under the Constitution's enumeration of types of cases in which the Supreme Court would have original jurisdiction. There was nothing that any court could do about the problem.

We do not know what collaborative process led to the issuance of this type of opinion, but we do know that Marshall here promulgated an opinion akin to his several opinions decried by Jefferson as “not belonging to the case often, but sought for out of it, as if to rally the public opinion beforehand to their [the justices'] views, and to indicate the line they [the public] are to walk in.”⁶¹ Jefferson no doubt felt vindicated by Marshall's performance in his decision not to deliver the commissions to Marbury and his fellows.

Besides that, Marshall ought to have recused himself. The suit centered on an omission of his while secretary of state—his non-delivery of the three appointees' commissions. At issue, as a moral if not as a legal matter, was whether, as he said he thought, an appointment became effective when the Senate consented to it or when, as President Jefferson thought, the appointee received his commission. Marshall told his brother at the time, “to withhold the commission of the Justices is an act of which I entertained no suspicion.”⁶²

A federal court could issue an opinion and claim a power—in this case, of judicial review. It could also issue a stinging lecture to the highest officials in the Executive Branch. What it could not do was to take on Congress or the president directly. Fire could well be trained in the other direction, however.

IX.

A.

So, early in 1803, the House of Representatives voted to impeach a New Hampshire district judge named John Pickering. The unfortunate Pickering, it was said, had committed dereliction of duty by routinely turning up inebriated in court. In some cases, Pickering's judicial behavior had been completely arbitrary, to the great detriment of parties before him. So, for example, the ship *Eliza* was seized by the government for infraction of the

61. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *as reprinted in* KEVIN R. C. GUTZMAN, *THOMAS JEFFERSON—REVOLUTIONARY* 76 (2017).

62. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *supra* note 57.

law, and without hearing the government's evidence, Pickering ordered that the ship be turned over to its captain. He then refused to allow that his ruling be appealed. All the while, he impressed all those present as not in his right mind.⁶³

In the Senate, what looked likely to be a routine case turned out to be somewhat complicated. First, Pickering's counsel submitted a letter from Pickering's son saying that the judge was not a drunkard, he was senile.⁶⁴ Second, the Pickering forces argued that whatever one might think of drunkenness or senility in a judge, it was not "treason, bribery, or other high crimes and misdemeanors," i.e., constitutional grounds for impeachment.⁶⁵

Pickering's counsel here helped establish what now seems an immortal, incorrect understanding of constitutional text. "High crimes and misdemeanors," they argued, are misdeeds indictable at common law.⁶⁶ Although the Senate did not state its grounds for removing Pickering from his office, this argument would echo in all subsequent Senate impeachment trials.

B.

1.

Having removed Pickering, the House decided it had bigger fish to fry. The idea came from President Jefferson, who wrote one of the Republican leaders of the House, Joseph H. Nicholson, to complain of Chase's behavior on circuit. Referring to a grand jury charge in which Chase had denigrated various recent legal reforms in Maryland and cast aspersions upon Jefferson himself, Jefferson asked, "Ought this seditious and official attack upon the principles of our Constitution, and on the proceedings of a State, to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures?"⁶⁷ Then, striking a characteristic disinterested pose, he added, "I ask these questions for your consideration. For myself, it is better that I should not interfere."⁶⁸

2.

Immediately upon Pickering's conviction, then, Nicholson's close ally Representative John Randolph of Roanoke (R-VA) moved articles of impeachment against Justice Chase. Those articles asserted that Chase had committed high crimes and misdemeanors by abusing his office in matters

63. WILLIAM H. REHNQUIST, *GRAND INQUESTS* 127 (1992).

64. 13 *Annals of Cong.* 328–329 (1804).

65. Lynn W. Turner, *The Impeachment of John Pickering*, 54 *AM. HIST. REV.* 3, 485–507 (1949).

66. *Id.*

67. Letter from Thomas Jefferson to Joseph H. Nicholson (May 13, 1803), <https://founders.archives.gov/documents/Jefferson/01-40-02-0278>.

68. 4 DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801–1805*, at 467 (1970); Letter from Thomas Jefferson to Joseph H. Nicholson (May 13, 1803), *supra* note 67.

such as his conduct of the Callender trial and the Cooper trial. He had made no secret of being a partisan judge, either in the political sense or in the judicial sense, but instead had predetermined cases' outcomes and ram-paged beyond the bounds of proper judicial behavior along the way.

In the Cooper case, Chase charged the jury that anyone who "attempts to destroy the confidence of the people in their officers . . . effectually saps the foundation of the government."⁶⁹ As the Republicans feared, Chase's behavior seemed calculated to make free elections impossible. How, after all, would any of our recent federal elections have looked if criticism of incumbent officials had been banned? What would be the point of the Speech and Press Clauses if they did not protect expression of political opinion?

The standard account of the Chase trial holds that Randolph, who was not an attorney, was outclassed at the Senate bar by the all-star roster of Federalist lawyers who argued for Chase's acquittal. Their chief contention was the same as Pickering's lawyers' chief argument on Pickering's behalf: that whatever one might say about their client's performance of his judicial duties, it did not amount to treason or bribery, and it was not a "high crime or misdemeanor."

Here, Berger objects strenuously. A high crime is not a crime, he shows from extensive English precedents, and a high misdemeanor is not a misdemeanor. The point of the impeachment clauses is not to ensure that pickpocket presidents or judges can be removed from office. Rather, they are Congress's mechanism for policing the constitutional behavior of the other two branches. One would be hard-pressed, however, to read Justice Chase's acquittal as anything other than a license for all but the most abusive official behavior by Article III federal judges. In fact, none has ever been impeached for anything other than a crime since. Berger concludes that Chase's "removal would have served as a standing reminder that there is no room on our bench for an implacably prejudiced judge, and . . . his factional acquittal was a miscarriage of justice."⁷⁰

3.

The Chase acquittal disgusted President Jefferson. Despite Hamilton's promise in *The Federalist No. 79* that good behavior tenure was safe, because Congress could impeach wrongdoers, the impeachment provisions, Jefferson said, were "not even a scare-crow."⁷¹

69. BERGER, *supra* note 31, at 250–251.

70. *Id.* at 234.

71. THE FEDERALIST NO. 79, at 409 (Alexander Hamilton) (I. Kramnick ed. 1987); Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *supra* note 56 (for examples of Thomas Jefferson's repeated use of this metaphor).

X.

A.

The next confrontation between the Jeffersonians and the Federalist judges arose out of the apostasy of one of Jefferson's chief allies, his first-term vice president, Aaron Burr. Having refrained in 1801 from stating that due to voters' expectations, Jefferson, not he, ought to be chosen president by the House of Representatives, Burr was maneuvered out of his high standing in the party by the middle of his vice-presidential term. Looking to rehabilitate himself, he ran for governor of New York. Out of that decision arose the sequence of events whose result was Burr's shooting of Alexander Hamilton.⁷²

Under indictment in two states, Burr served out his term—including presiding over the Chase impeachment trial. He then seems to have been at the center of a scheme to filibuster in Mexico, if not to form a new country including part of Mexico and part of the Louisiana Territory. Persuaded that Burr intended to use force to overthrow the American government in at least some of the lands whose acquisition was Jefferson's outstanding presidential achievement, the president sent for Burr to be arrested and transported back to Richmond, Virginia for a treason trial.⁷³

B.

Jefferson's behavior in connection with the supposed Burr Conspiracy and the treason trial marked a low point in his political career. Why he was so certain of his quarry's guilt, we do not know. His pre-trial public proclamation of Burr's guilt is inexcusable. That he claimed a right to disobey the law cannot be denied. He did however comply with Marshall's subpoena *duces tecum*, and nothing other than his own sense of constitutional propriety made him.

For his part, Burr used all of his considerable legal expertise in fighting for acquittal.⁷⁴ While he had prominent legal counsel, he managed the defense himself. The marshal assembled quite an eminent group of potential jurors, though it was not to Burr's liking. When Burr objected to the presence of William Branch Giles and Wilson Cary Nicholas—both sometime Jeffersonian US senators—on the jury, the prosecution agreed to their withdrawal. Burr predictably had no trouble with Marshall's selection of Marshall's friend and cousin John Randolph of Roanoke, formerly US House Jeffersonian leader but now Tertium Quid anti-Jeffersonian schismatic, as foreman.

72. See generally NANCY ISENBERG, *FALLEN FOUNDER: THE LIFE OF AARON BURR* (2007).

73. See R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR* (2012).

74. The following paragraph relies in part upon 5 DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805–1809*, at 311 (1974).

C.

It was during the pre-trial maneuvering that Burr requested his subpoena. This elicited substantial argument, much of it in the form of gratuitous attacks on Jefferson. Jefferson's most eminent biographer, who is usually a rather gentle Jefferson admirer, holds that Marshall should have intervened to cut off this kind of disputation sooner.⁷⁵ In the course of ruling in favor of Burr's request, Marshall said that of course the president could reply, as his labors obviously were not unrelenting (he retired to Monticello in the summers), and that Jefferson had a "wish" to see Burr convicted, which caused howls of rage from the prosecution.⁷⁶ One attorney on the prosecution team reported to Jefferson that Marshall had afterwards expressed regret for this statement.⁷⁷

Jefferson replied soon enough that he and all of the relevant members of his administration stood ready to respond by affidavit or production of required documents, insofar as the national interest allowed their disclosure, to the process of the circuit court. What they could not do, he added, was attend the various Burr-related court proceedings in Richmond, the Mississippi Territory, and St. Louis: the Constitution wisely contemplated that the Executive Branch would be always in session.⁷⁸

When Jefferson learned that Burr had raised the issue of Jefferson's partial compliance with the subpoena *duces tecum*, the president wrote to the attorney general reminding him that at Monticello in the summer, he continued the work of the presidency, and noting that he had taken steps to retrieve relevant correspondence not then in his possession. Apparently, Marshall's snide remark about the presidency as a part-time job rankled.⁷⁹

D.

On July 14, Jefferson wrote to his friend Pierre du Pont de Nemours describing the Burr trial. "Altho' there is not a man in the U.S. who is not satisfied of the depth of his guilt, such are the jealous provisions of our laws in favor of the accused, and against the accuser, that I question if he can be convicted."⁸⁰ That such a man could be tried, he said, reflected the "innate strength" of the American government.

The accuracy of Jefferson's appraisal of public opinion is reflected by the fact that ninety-six potential jurors had to be questioned before twelve were impaneled, and even some of the twelve said they were suspicious of

75. *Id.* at 318.

76. *Id.* at 319.

77. *Id.* at 320.

78. *Id.* at 322.

79. *Id.* at 333.

80. Letter from Thomas Jefferson to Pierre du Pont de Nemours (July 14, 1807), as reprinted in 5 DUMAS MALONE, JEFFERSON THE PRESIDENT: SECOND TERM, 1805–1809, at 334 (1974).

Burr's behavior.⁸¹ "Before an impartial jury," Jefferson told one of the prosecutors, "Burr's conduct would convict himself, were not one word of testimony to be offered against him. But to what state will our law be reduced by party feelings in those who administer it?"⁸²

E.

Marshall essentially decided the case before submitting it to the jury. He held that since the Constitution's definition of "treason" included "levying war against" the United States, mere assembly of men, even if with that intention, did not suffice.⁸³ Rather, they had to have been armed. The assembled conspirators in this matter had not been armed, and so testimony concerning their behavior in assembling and when assembling was not admissible into evidence. Besides that, the chief justice said that Burr would have had to be present among the assembled, constructively present among them, or the procurer of the assemblage to be responsible for it. If the last, there would have to be two witnesses to his procuring it. The prosecution could not clear this hurdle.⁸⁴ Thus instructed, the jury returned the extremely unusual verdict of, "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."⁸⁵ Despite the Burr lawyers' protest, Marshall accepted this, entering a verdict of "Not Guilty."⁸⁶

Jefferson, appalled, wrote to the chief prosecutor asking him to preserve the evidence.⁸⁷ Congress would be informed, so that it could decide whether any "defect" was "in the evidence of guilt, or in the law, or in the application of the law."⁸⁸ Thus informed, it could take corrective measures. He soon wrote to James Wilkinson predicting that Congress would amend the Constitution to establish a means for it to correct a misbehaving judge.⁸⁹

81. 5 DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805–1809*, at 334 (1974).

82. Letter from Thomas Jefferson to George Hay (Aug. 20, 1807), *as reprinted in* 5 DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805–1809*, at 335 (1974); Letter from Thomas Jefferson to George Hay (Aug. 20, 1807), <http://founders.archives.gov/documents/Jefferson/99-01-02-6225>.

83. *See* 5 DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805–1809*, at 338 (1974).

84. *See id.*

85. *Id.* at 339.

86. *Id.*

87. *See* Letter from Thomas Jefferson to George Hay (Sept. 4, 1807), <https://founders.archives.gov/documents/Jefferson/99-01-02-6320>.

88. *Id.*

89. MALONE, *supra* note 68, at 339–340 (1974); *see* Letter from Thomas Jefferson to James Wilkinson, (Sept. 20, 1807), <https://founders.archives.gov/documents/Jefferson/99-01-02-6415>.

XI.

A.

Republican hostility to Marshall and his colleagues continued to simmer through the first decade of the nineteenth century and into the second. The next flashpoint of confrontation came in the second half of that decade and the beginning of the following one, when the classic cases of *Martin v. Hunter's Lessee* (1816), *Dartmouth College v. Woodward* (1819), *McCulloch v. Maryland* (1819), and *Cohens v. Virginia* (1821) highlighted the ongoing difference between the Republicans' and the justices' constitutional views.⁹⁰

B.

1.

Martin v. Hunter's Lessee arose out of a title dispute in northern Virginia. Marshall, an interested party, recused himself, and so James Madison appointee Justice Joseph Story wrote the Court's opinion. It could as well have been written by Marshall. Indeed, one would be unsurprised to learn that Story had consulted Marshall in writing it—though the Massachusetts justice could well have written it himself.⁹¹

The Supreme Court had met with overt resistance from the Virginia Court of Appeals (today's Supreme Court of Virginia), which refused to cooperate in a Supreme Court review of its ruling. Chief Judge Spencer Roane, a son-in-law of Patrick Henry and long-time Jeffersonian activist, insisted for his court that Congress had no right to empower the Supreme Court to hear the case.⁹² Virginia's courts were not subordinate to the Supreme Court, he wrote, but a parallel system. Judges on the Court of Appeals swore to uphold the US Constitution, and they did so.

2.

Perhaps predictably, the justices disagreed. Story said that Section 25 of the Judiciary Act of 1789, which gave the Supreme Court appellate juris-

90. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

91. If, as Jefferson thought, the goal of a judicial appointment was to push forward the appointing president's constitutional views, Madison's appointment of Story may rank as the worst appointment in history. Jefferson warned his friend not to make it, but Madison went ahead. See generally KEVIN R. C. GUTZMAN, *JAMES MADISON AND THE MAKING OF AMERICA* 313 (2012).

92. For Roane's relationship to his colleague St. George Tucker, see generally PHILLIP HAMILTON, *THE MAKING AND UNMAKING OF A REVOLUTIONARY FAMILY* (2003). See also F. THORNTON MILLER, *JUDGES AND JURIES VS. THE LAW* (1994).

diction over federal questions decided in state supreme courts, was constitutional.⁹³ The Court of Appeals would forward its papers in the case.

Which it never did. The Supreme Court had established its precedent, but it never received compliance. Besides forbearing to comply, Roane bided his time until he had another chance to rebuke the Supreme Court.

C.

In early February 1819, the Supreme Court handed down its decision in the case of *Dartmouth College v. Woodward*.⁹⁴ Here, the Court waded into roiling New Hampshire political waters on the side of Marshall's fellow Federalists. Like other New England states, New Hampshire had recently switched from the Federalist into the Republican column. Predictably, the new legislative majority decided to reorganize the state's leading institution of higher learning.⁹⁵

Like other American colleges of colonial vintage, Dartmouth held a charter. Marshall ruled that the charter was a private contract—incorrectly, since New Hampshire had received no consideration for it—and so, under the Contracts Clause, the sovereign had no claim upon it. Thus, the legislation to reorganize Dartmouth College was unconstitutional. Despite the voters, the college would remain Federalist. New Hampshire and other Republicans' outrage can be imagined.

XII.

A.

Virginia Republicans' anti-judicial chagrin reached its height with the next, truly landmark, great decision of the Marshall Court. This is where Roane would unlimber his chief rhetorical guns. Well might he have, for *McCulloch v. Maryland* (1819) remains arguably the most important case in Supreme Court history. The case centered on the extent of Congress's legislative power.

B.

Although he had as a House member invented the argument that legislation chartering a bank corporation overstepped the constitutional bounds on Congress's power, James Madison changed his mind by the time the Bank of the United States' charter expired in 1811. Characteristically, however, he kept his opinion to himself. Despite Secretary of the Treasury Al-

93. *Martin*, 14 U.S. (1 Wheat.) at 304.

94. 17 U.S. (4 Wheat.) 518 (1819).

95. See NEWMYER, *supra* note 47, at 244–253.

bert Gallatin's lobbying effort, a bill to renew the charter went down to defeat.⁹⁶

Then came the War of 1812. Among reasons that war was a debacle, the Republicans' decision to scale back the military beginning in 1801 claims pride of place. Close behind, Madison thought, was the absence of a Bank of the United States (BUS), which would have facilitated financing the war. He signed a bill creating the Second Bank of the United States into law in 1816.

Madison cloaked his evident *volte-face* in the rhetoric of precedent—if this were the first time Congress had tried to charter a bank, it would be impermissible, he said, but since it had been done before and accepted by a string of presidents and legislatures, the issue was settled. Thus Madison, ever touchy about his reputation for inconsistency, insisted he had not actually changed his position.

C.

While a Republican Congress and the Republican president leapt aboard the Hamiltonian train, several state governments remained true to the old Jeffersonian principles. Some states legislated against operation of the bank within their territories. One, Maryland, established a substantial tax for operating a corporation not chartered by Maryland within the state's territory. James McCulloch, head of the Maryland branch of the BUS, appealed a fine for operating the BUS branch within Maryland without first paying the required fee, and the case was sped through the top Maryland court to the US Supreme Court—where Marshall awaited it.

Newmyer speculates that perhaps this was an arranged case.⁹⁷ After all, not only did it make its way to the Supreme Court on a fast track, but both Maryland and McCulloch had interests in the BUS's perpetuation. More pertinently, Marshall handed down his famous opinion in the case within a week of oral argument.

D.

That opinion essentially echoed Hamilton's 1791 Cabinet argument for nearly limitless congressional legislative power. Enumeration was impracticable, he said. "Necessity" under the Necessary and Proper Clause was for Congress to judge. This was a national constitution, so these principles all followed.

96. For Madison and bank recharter, see KEVIN R. C. GUTZMAN, *JAMES MADISON AND THE MAKING OF AMERICA* 310–311 (2012).

97. See NEWMYER, *supra* note 47, at 294–295.

E.

Virginia Republicans were aghast. Madison privately expressed great unhappiness with Marshall's performance. While he agreed that the weight of precedent must be considered dispositive in relation to Congress's power to charter a bank, he recoiled at the chief justice's reasoning. Madison, the Constitution's leading author and Virginia's leading ratifier, said:

It was anticipated, I believe, by few if any of the friends of the Constitution that a rule of construction would be introduced, as broad and as pliant as what has occurred. Those who recollect, and still more, those who shared in what passed in the State Conventions, thro' which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, can not easily be persuaded that the avowal of such a rule would not have prevented its ratification.⁹⁸

Madison insisted that Congress should, before undertaking to legislate along these lines, employ its amendment power, laid out in Article V of the Constitution, to secure the people's consent. Madison stated:

It has been the misfortune, if not the reproach of other nations, that their Governments have not been freely and deliberately established by themselves. It has been the boast of ours that such has been its source, and that it can be altered by the same authority only which established it. It is a further boast that a regular mode of making proper alterations, has been providently inserted in the Constitution itself.⁹⁹

He held it "anxiously to be wished . . . that no innovations may take place in other modes; one of which would be a constructive assumption of powers never meant to be granted."¹⁰⁰ Marshall's opinion, which purported to legitimize exercise of powers the people had not granted, thwarted the people's will.¹⁰¹ As we have seen, Madison's recollection of the ratification process was correct.

F.

I.

Madison was not alone in calling the events of 1788 to mind. Another was Judge William Brockenbrough. Brockenbrough's response to *McCulloch* took the form of two essays under the pseudonym "Amphyction"

98. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), as quoted in KEVIN R. C. GUTZMAN, *THOMAS JEFFERSON—REVOLUTIONARY* 73 (2017).

99. *Id.*

100. *Id.*

101. *Id.* at 73–74.

which ran in the *Richmond Enquirer* on March 30 and April 2, 1819.¹⁰² Brockenbrough began by noting that the Court's Marshall-era habit of uniting behind one opinion left matters unclear in the careful reader's mind: he did not know whether all the judges were united in all of the chief justice's reasoning, or even in any of it. So, it could be that all agreed the bank law was constitutional without all concurring in the assertion that the states were not the parties to the federal compact; it could be that some thought the bank bill fell under the Necessary and Proper Clause without giving that clause so "latitudinous" a reading as Marshall did; possibly some of them just thought it was for Congress to apply the Necessary and Proper Clause, and not for the judges to interfere; perhaps, he concluded, some of them thought the law "necessary and proper" in connection with one expressly delegated power, while others thought it necessary and proper in relation to another. In short, Brockenbrough would have liked seriatim opinions.¹⁰³

Brockenbrough pointed out that Marshall's opinion dealt with a question at the center of the division between the two great parties. In doing so, Marshall had raised two questions which "appear[ed] to [Brockenbrough] to endanger the very existence of state rights. The first [was] the denial that the powers of the federal government were delegated by the states; and the second [was] that the grant of powers to that government, and particularly the grant of powers 'necessary and proper' to carry the other powers into effect, ought to be construed in a liberal, rather than a restricted sense."¹⁰⁴

Not only was the question whether the Federal Government's powers had been delegated by the states a dangerous one, but Brockenbrough thought that deciding it was unnecessary to deciding the case at hand. Whether the powers had been granted by one American people or "by the states in their sovereign capacity" did not affect the extent of Congress's power. So why consider it?

The states as discrete communities ratified the Constitution, Brockenbrough insisted, and thus Rhode Island remained outside the union until it ratified, even though ninety-five percent of the American people already had. The Federal Government depended on the state governments for its existence, as in electing senators, drawing congressional districts, providing for election of presidential and vice presidential electors, etc. Under Article V, the states could amend the Constitution. Although the states created, maintained, and could change the Constitution, the Supreme Court undertook to claim that the states had not done so—just as in 1798–99, when Congress imposed the Sedition Act and gave the president arbitrary authority over alien friends.

102. AMPHICTYON ESSAYS 1–2, reprinted in JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* 52–77 (Gerald Gunther ed., 1969).

103. *Id.*

104. *Id.* at 54–55.

Without the ongoing participation of the states in the system, who would rouse the people in response to federal usurpation, as in 1798–1800? Brockenbrough provided extensive excerpts from the Virginia Report of 1800, known since then to have been drafted by Madison, which laid out the Republican case for interposition of state governments in case of dangerous federal usurpation.

2.

In his second Amphyction essay, Brockenbrough attacked Marshall's claim that the Necessary and Proper Clause should be read liberally. Here, he took up Marshall's conclusion, borrowed from Alexander Hamilton, that "necessary" did not mean necessary, it might instead mean "*useful, or convenient, or conducive to the effectual execution of the foregoing powers.*" The judge sensibly asked why the Framers, if that had been what they meant, would have used the word "necessary." That word, he concluded, "certainly is not" synonymous with any of those other words. Not only that, he continued, but if "necessary" were read as Marshall read it, it would add nothing to "proper." More pointedly, he noted that reading these terms as Marshall did left "no limitation whatsoever to Congress's authority." He next adduced passages from Hamilton's contributions to *The Federalist* and from Coke on Littleton to show that "necessary" meant . . . well, necessary.

Beyond that, Brockenbrough noted that reservation of power to the states is a desirable feature of a constitution, for men are most apt to be happy where policy is made locally, Americans were used to having policy made by their states, the different states were differently situated, and the Federal Government would be overwhelmingly strong if not limited by federalism.

Brockenbrough finally took a turn very similar to the one we saw Madison take when he first read Marshall's reasoning in *McCulloch*. His chief objection, he said, was not to Congress's creation of a bank, but to Marshall's reasoning in this case. In 1816, unlike in 1791, one might argue that the amount of bank paper in circulation made creation of the BUS actually necessary in a sense creation of Hamilton's had not been.

3.

a.

Upon reading these pieces, Marshall took to the papers in answer. His brother was in Philadelphia, where he placed John's essays in the *Federalist Union*.¹⁰⁵ They ran on April 24 and 28, 1819, under the name "A Friend to the Union."¹⁰⁶

105. *Id.* at 14.

106. NEWMYER, *supra* note 47, at 337.

Like the Federalists of ratification days, Marshall here adopted the pose of defender of the federal union against supposed attackers. The reason for the “Amphyction” essays, he claimed, was to drive Americans toward disunion. The two elected branches of the Federal Government were closely tied to the people, he asserted, while the judges’ appointments and life tenure made them fat targets for critics. Thus, an enemy to the union might think it more likely he could bring readers to hate the Federal Government through making them hate the judiciary than that he could alienate them from the other branches.

b.

First, Marshall countered Brockenbrough’s queries concerning the unity of the Supreme Court in the *McCulloch* opinion’s reasoning by asking whether anyone thought any of the justices would have sat silent as the chief pronounced principles with which he did not agree. The general rule, he noted, was that in case one opinion was announced as the opinion of the whole court, it was the opinion of each of the judges. Amphyction’s reasons for raising this question seemed to be to highlight the chief justice’s past career as a Federalist politician, to associate his reasoning with Alexander Hamilton, and thus to associate the opinion with “political heresy.” Marshall was quick to note that four of the justices in the case were appointed to the Supreme Court by Presidents Jefferson and Madison—which would seem to guarantee they were not heretics.

c.

Next, Marshall toyed with Amphyction a bit. Why did he make so great an effort to show that the Constitution was created by the states in their sovereign capacity instead of by the people, Marshall wanted to know, if the issue was unimportant? In fact, he added, if the word “states” referred to the people of the states, then Amphyction was arguing about nothing.

d.

Yet, Marshall immediately contradicted himself. The Constitution means what it says, the chief justice noted, and so, “We the people of the United States” refers to the people, not the states. (Marshall did not consider the import of Article VII’s use of the word “states.”) He went on to say that Amphyction’s claim that, “the constitution was submitted to conventions elected by the people of the several states . . . representing, not the whole mass of the people of the United States, but the people only within the limits of the respective sovereign states. . . ,” was entirely consistent with the *McCulloch* court’s opinion explaining its decision. According to Marshall, Luther Martin, as counsel for Maryland, had argued that the Constitution was the act of, in Marshall’s words, “sovereign and independent

states; clearly using the term ‘states’ in a sense distinct from the term ‘people.’”¹⁰⁷ This is why the Supreme Court had rejected Martin’s reasoning.

Having thus seemed to accept the Principles of ‘98, “A Friend to the Union” then immediately contradicted them, and himself. “Nothing can be more obvious,” he said, “than that in every part of the opinion, the terms ‘state’ and ‘state sovereignties’ are used in reference to the state governments, as contradistinguished from the people of the states” (emphasis added). Here we see the difficulty: Marshall does not understand that so far as Virginia Republicans are concerned, the “state sovereignties” are the peoples of the individual states. To refer to a state government as a “sovereignty” is nonsensical.

4.

“A Friend to the Union’s” second essay considered Amphyction’s second major objection to the Supreme Court’s opinion: Marshall’s claim that the Necessary and Proper Clause should be read liberally. The Court had claimed no such thing, said Marshall. Rather, it had staked out a reasonable position—neither niggardly nor “beyond [the term’s] obvious import.” The issue was the Necessary and Proper Clause’s “true intention,” and that was to be read in light of the exclusion of the word “expressly” from the Tenth Amendment (which, recall, was added to the Constitution three years after that charter’s ratification—a ratification achieved by Federalists in part through Governor Randolph’s assurances in the Virginia Ratification Convention, in which Marshall was a participant, that Congress would have only the powers “expressly” granted).

In the end, said Marshall, the Court stood for “the fair interpretation,” Amphyction for “the restricted interpretation.” He laid out several examples of federal laws that were not strictly speaking necessary to exercise of Congress’s powers—in the sense that no other provision could have been substituted for a particular one in the statute—and concluded that Amphyction’s reading would bring the Federal Government to a standstill. What he did not provide was a single example of a hypothetical federal law that would run aground on the “necessary” requirement. One infers that he did not think there was one. He then repeated his language from *McCulloch* to the effect that:

the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

107. JOHN MARSHALL, “A FRIEND TO THE UNION” ESSAYS (1819), reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 78, 78–105 (Gerald Gunter ed., 1969).

Whatever one thinks of the practicalities, “necessary and proper” is certainly an odd way to express this idea.

5.

a.

That was not the end of it. Soon after these essays’ appearance, Chief Judge Spencer Roane of the Virginia Court of Appeals (now the Virginia Supreme Court) assumed the venerable republican name “Hampden” as nom de plume for four anti-*McCulloch* essays of his own. These too appeared in the *Richmond Enquirer*.¹⁰⁸

b.

Roane began by saying it had been understood by Americans that their federal government had few powers—only those “expressly granted” and those “necessary incidents” to such, with the rest reserved to the states. He believed this had been the original design, and that the Tenth Amendment merely made explicit what had already been implicit—to quiet “the natural fears and jealousies of our citizens,” as the Preamble to the Bill of Rights said.¹⁰⁹

Yet, he said, this safeguard had proven inadequate. Congress had grabbed at more power anyway, and the judiciary had chipped in to help. Numerous congressmen had gone so far as to say that in time, Congress’s powers would be such as they judged desirable, and Hamilton had blazed the trail in his Report on Manufactures. The courts had deigned to “preach political sermons from the bench . . . , and bolster up the most unconstitutional measures, of the most abandoned of our rulers” Instead of establishing limits to Congress’s power, “[t]hey resolved . . . to give a *general* letter of attorney to the future legislators of the union: and to tread under foot all those parts and articles of the constitution which had been, heretofore, deemed to set limits to the power of the federal legislature.”¹¹⁰ That man, he concluded, “must be a deplorable idiot who does not see that there is no earthly difference between an *unlimited* grant of power, and a grant limited in its terms, but accompanied with *unlimited* means of carrying it into execution.”¹¹¹ What the Supreme Court had given Congress was a power to legislate for Americans “in all cases whatsoever,” he con-

108. SPENCER ROANE, “HAMPDEN” ESSAYS (1819), reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 107, 107–154 (Gerald Gunter ed., 1969).

109. U.S. CONST. amend. I, pmbl., reprinted in THOMAS E. WOODS JR. & KEVIN R. C. GUTZMAN, WHO KILLED THE CONSTITUTION?: THE FEDERAL GOVERNMENT VS. AMERICAN LIBERTY FROM WORLD WAR I TO BARACK OBAMA 215 (2008).

110. ROANE, *supra* note 108, at 110.

111. *Id.*

cluded.¹¹² (Educated Americans in Roane's day would have recognized the allusion to the Declaratory Act of 1766.)

6.

a.

Roane opened his second essay in the series by reiterating that the Federal Government had only the enumerated powers—a point which he underscored by quoting assurances to that effect given in the Virginia Ratification Convention by Madison, Edmund Randolph, George Nicholas, and John Marshall. He then laid out Madison's/Virginia's extended assertion to this effect in the famous Report of 1800. Among other interesting points Madison made in the Virginia Report was that "it is *immaterial* whether unlimited powers be exercised under the name of unlimited powers, or under that of unlimited means of carrying a limited power into execution. . . ." To Roane, the question came down to whether a power was "expressly granted" or "(to use the language of the report) FAIRLY INCIDENTAL" to such a power. He went on to show that both the law of nations, as elucidated by Vattel, and the common law were to the same effect. *The Federalist* made an appearance in support of his assertion as well.

b.

Roane's third essay summarized his case thus:

I have also shown, that . . . such means were implied, and such only, as were *essential* to effectuate the power: and that this is the case, in all the codes, of the law of nature, of nations, of, war, of reason, and the common law. [sic] The means . . . admitted by them all, and especially by the common law, are laid down, emphatically, to be such, *without which* the grant cannot have its effect. . . .

Through the rest of the piece, he assailed each of Marshall's assertions in turn. One particular rebuttal says that the Supreme Court's assertion that the Constitution must be read differently because it applies to a large space is nonsensical: "The principles I have mentioned are immutable, and apply to *all* compacts. It is entirely unimportant, whether the territory to which the compact relates, extends from 'Indus to the pole,' or be no larger than that of the county of Warwick."¹¹³ Often, Marshall's rhetoric was exposed as risible.

112. *Id.* at 112.

113. ROANE, *supra* note 108, at 127.

c.

In other places, Roane showed that Marshall is mistaken, as in his saying that the Federal Government is “supreme.” “This word ‘supreme’ does not sound well,” the Virginia judge noted, “in a government which acts under a limited constitution. The *people* only are supreme. The constitution is subordinate to them, and the departments of the government are subordinate to that constitution.” “A body which is subordinate to a compact, which is subordinate to another body, can scarcely be said to be supreme.”

The reader of Judge Roane’s extensive refutation of virtually every significant assertion of Chief Justice Marshall cannot but feel a twinge of sympathy for the Great Chief Justice, for whom reading these articles must have been somewhat painful, even embarrassing. All the leading legal authorities, Dr. Johnson’s dictionary, the most prominent Virginia Ratification Convention Federalists, and even Alexander Hamilton himself are repeatedly enlisted in the campaign to demolish *McCulloch v. Maryland*.

7.

a.

In his fourth and final essay, Judge Roane made clear that he had read both the Amphyction and the A Friend to the Union essays. He then said that while he could not tell whether the Supreme Court considered the government a national one or a federal one, he agreed with Madison’s argument in *The Federalist No. 39* that the government is a federal one, because its ratification was federal. He next cited Madison saying in the Richmond Convention that the people as thirteen sovereignties were ratifying the Constitution. He completed the hat trick by showing Madison saying the same thing in the Virginia Report of 1800.

b.

Next, Roane countered Marshall’s insistence that the government is national, not federal, because it acts on individual people directly, not on the state governments by pointing to passages in both Montesquieu’s *De l’esprit des lois* and *The Federalist* saying that a federal government may or may not act upon individuals. Article V is his best evidence that the government is a federal one, though it has some national structural features. He concluded that, “Our general government then, with submission to the opinion of the supreme court, is as much a federal government, or a ‘league,’ as was the former confederation. The only difference is, that the powers of this government are much *extended*.”¹¹⁴

114. JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 146 (Gerald Gunter ed., 1969).

8.

In response to these essays, Chief Justice Marshall once again took to the newspapers—this time, the District of Columbia’s *Alexandria Gazette*. Between June 30 and July 15, 1819, he wrote nine essays under the name “A Friend of the Constitution.”¹¹⁵ In the first of them, the Virginia judges’ criticism of his handiwork was put down to “deep rooted and vindictive hate, which grew out of unfounded jealousies,” and Marshall said that their goal was “to reinstate that miserable confederation, whose incompetency to the preservation of our union, the short interval between the treaty of Paris and the meeting of the general convention at Philadelphia, was sufficient to demonstrate. . . .”¹¹⁶ The judiciary, he said, was politically the weakest part of the Federal Government, and thus the easiest for opponents of the Federal Government to attack.¹¹⁷

The people, Marshall said, created the government. They had an interest in its efficacy. “Hampden’s” policy of erring against federal power, then, might be expected sometimes to deny the people the benefit on which they had counted in ratifying the Constitution.

9.

When his work was done, Roane mailed copies to Madison and Jefferson. We have seen Madison’s response. Jefferson’s was even more supportive. “I have read in the *Enquirer*,” Jefferson told him, “and with great approbation the pieces signed Hampden, and have read them again with redoubled approbation in the copies you have been so kind as to send me. I subscribe to every tittle of them.”¹¹⁸

XIII.

A.

Here, Jefferson would unburden himself of anti-Marshall Court frustration built up over many years. Along the way, he would put the entire conflict between his party and the Federalist judges in the starkest terms. Roane’s articles, he said:

contain the true principles of the revolution of 1800, for that was as real a revolution in the principles of our government as that of 1776 was in its form The nation declared its will by dismissing functionaries of one principle, and electing those of another, in the two branches, executive and legislative, submitted to their election.

115. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *supra* note 57.

116. JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 114, at 155.

117. *Id.* at 156.

118. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *supra* note 57.

Then he came to the great problem: that the Constitution gave the people no elective check upon the judiciary, which had “continued the reprobated system.” Despite Republican presidents’ appointments, the judges continued on the same path (“the leaven of the old mass seems to assimilate itself to the new”).¹¹⁹ Two decades’ uninterrupted Republican dominance of the elective branches of the Federal Government had not solved the problem; rather, “we find the judiciary on every occasion, still driving us into consolidation.”¹²⁰

B.

Jefferson’s sole criticism of Roane was that the Virginia judge had granted Marshall too much. “In denying the right they usurp of exclusively explaining the constitution,” he said, “I go further than you do, if I understand rightly your quotation from the *Federalist*.” Publius said that the judiciary would have the final say about the constitutionality of actions of the other branches, and to Jefferson, this would make the Constitution a mockery: instead of three mutually-checking branches, the system would feature one branch entitled to direct the others—and that one “independent of the nation,” because “experience has already shown that the impeachment it has provided is not even a scarecrow.”¹²¹

C.

Marshall’s method, Jefferson fulminated, was to throw out opinions unrelated to the cases at hand, with the idea that their teaching might be useful later. Regrettably, he said, not even one member of the House of Representatives—the institution with impeachment power—had made a speech on the matter. The judges, then, treated the Constitution as “a mere thing of wax . . . which they may twist, and shape into any form they please.”

Jefferson denied that the Constitution empowered federal judges to hold the other branches to their constitutional views. Rather, each branch had to interpret the Constitution for itself “in the cases submitted to its action; and especially, where it is to act ultimately” He gave examples from his own presidential tenure, such as pardoning people convicted and sentenced in the courts under a Sedition Act passed by Congress, withholding commissions from those of the Midnight Judges whose commissions had not been delivered, and withholding the Monroe-Pinkney Treaty of 1806 from the Senate despite senators’ desire that it be submitted, on the grounds that while Senate ratification was necessary to adoption of a treaty, it was not necessary to rejection of the treaty.

119. *Id.*

120. *Id.*

121. *Id.*

D.

Whatever he thought of Jefferson's constitutional argument, Roane must have been thrilled at his support. Probably disappointing, however, was Jefferson's request that Roane keep the letter to himself. Jefferson did not want to be drawn into a hot public dispute at just the moment when he needed the General Assembly's support for his fledgling state university. His public intervention in the controversy was not needed, however. As Newmyer said, "Rather than settling the matter definitively, *McCulloch* produced a states' rights, anti-Court reaction that diminished [the Supreme Court's] authority during the remainder of the antebellum period."¹²²

XIV.

Thomas Jefferson went to his grave bewildered at the chief justice's ability to enfold Republican Supreme Court appointees in his Federalist majority and distraught over the results. While Republicans had for a quarter-century won all the political battles, Marshall had been winning the long-term constitutional war. In retrospect, it seems that despite John Marshall's mastery of the craft of opinion-writing and the disappointing failure of such as Joseph Story to advocate judicial Republicanism, the turning point in the war came in 1805, when Justice Samuel Chase narrowly escaped the Senate conviction he so richly deserved. Once their colleague dodged that bullet, the other justices on the Supreme Court felt free first to rely on Hamilton's own reasoning in *McCulloch*, then to stake out increasingly extreme nationalist positions—whether in dubbing a charter a contract (*Dartmouth College v. Woodward* (1819)), in saying that Congress's legislative power in the District of Columbia could not be cabined off by the Old Dominion in exercise of its police powers (*Cohens v. Virginia* (1821)), or in otherwise extending the Federal Government's power to new lengths.

Ultimately, Jefferson allowed his endorsement of John Taylor's *Construction Construed*, a book-length attack on the Marshall Court, to be made public, which was only the second time in his life he had publicly endorsed a book.¹²³ For his part, Roane responded to the Supreme Court's *Cohens* decision by quoting John Marshall himself as having said in the Virginia Ratification Convention that Article III did not expose state governments to suit in federal courts. Despite that, and despite the 11th Amendment, the Supreme Court had ruled against Virginia anyway. The judges' power to rewrite the Constitution to suit their predilections was secure.

122. NEWMYER, *supra* note 47, at 270.

123. See SIMMS, *supra* note 44, at 181 (for this and the following point).